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No. 92-65

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER;
DONALD E. MAYORAS; MILNE TRUCK LINES;
ELLIOTT BURNSIDE; CHARLES N. PASS; THOMAS MORTON;
JAMES BRADFORD; ST. JOHNSBURY TRUCKING;
JONES TRUCK LINES; RIORDAN FREEMAN & SPOGLI;
RICHARD J. RIORDAN; BRADFORD M. FREEMAN;
RONALD P. SPOGLI,
Petitioners,
VS.
MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit
Corporation, or in the alternative Steven Bishop,
Charles E. Tharp, Debra Bishop and Ella Tharp,
as representatives of the class of affected former employees of
Milne Truck Lines, Inc., and their spouses,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether state law claims for fraud and emotional distress are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), when the claims are based on an employer's alleged promises of job security made to union employees and when the applicable collective bargaining agreement addresses job security expressly as well as by necessary implication.

2. Whether state law claims for fraud and emotional distress, based on an employer's alleged promises of job security to union employees and on an employer's alleged failure to timely disclose its plans to shut down, are within the exclusive jurisdiction of the National Labor Relations Board because the conduct complained of is "arguably prohibited" by the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.*

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MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit
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Charles E. Tharp, Debra Bishop and Ella Tharp,
as representatives of the class of affected former employees of
Milne Truck Lines, Inc., and their spouses,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit, rendered in these proceedings on May 4, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, as modified after a petition for rehearing, is reported at 1992 U.S. App. LEXIS 9174 (9th Cir. 1992) and is reproduced in the Appendix at 1a-27a. The pertinent opinions and orders of the United States District Court for the Northern District of California are unreported and are reproduced at 30a-44a.

JURISDICTION

Jurisdiction in the United States District Court was premised on Section 1441 and Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("Section 301"). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U.S.C. § 158:

> "*(a) Unfair labor practices by employer*
>
> It shall be an unfair labor practice for an employer
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

* * *

> "*(d) Obligation to bargain collectively*
>
> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages,

hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . ."

STATEMENT OF THE CASE

The Ninth Circuit's decision in this case permits approximately 600 former union employees of petitioner Milne Truck Lines, Inc. ("Milne") to pursue state law claims for fraud and emotional distress based on the shutdown of Milne's trucking operations in September 1987. Each respondent, represented herein by Milne Employees Association, was at all pertinent times covered by collective bargaining agreements which contained provisions governing job security, layoffs and plant closure, and which could be interpreted to permit Milne to shut down its operations. The collective bargaining agreements also contained express provisions prohibiting Milne from making any individual employee contracts which "in any way" conflict with the collective bargaining agreements. Nonetheless, in their complaint, respondents assert that they were entitled to rely on alleged oral statements in which Milne officials "explicitly promised them job security" in the midst of rumors that the plant would shut down. Respondents also assert that Milne had a duty to disclose its allegedly secret plan to shut down, a duty purportedly "independent" of obligations derived from the collective bargaining agreements. Yet, the collective bargaining agreements address the rights and duties attendant to plant closure.

The Ninth Circuit determined that resolution of respondents' contract-based claims — based on precisely the same conduct as the fraud claims — would involve an interpretation of the collective bargaining agreement and were preempted by Section 301, pursuant to *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 403-11 (1988) (state law claim is preempted by Section 301 if it requires the interpretation of a collective bargaining agreement). (13a-16a.) As to the fraud and accompanying emotional distress claims, however, the Ninth Circuit found that there would be no need to interpret the collective bargaining agreements because no specific provision in those agreements prohibited Milne from making promises of job security, or permitted Milne to shut down, and no conflict arose between Milne's purported promises and express provisions in the collective bargaining agreements. (8a-13a.) According to the Ninth Circuit, then, the employees could justifiably rely on the alleged oral representations of job security without regard to the collective bargaining agreements' own provisions as to job security, layoffs and change of operations, and without regard to the specific clauses prohibiting conflicting individual employment contracts.[1]

The Ninth Circuit's decision significantly erodes the doctrine of preemption under Section 301 and adds still more uncertainty to a muddled area of the law. In essence, the Ninth Circuit articulates a rule which makes preemptive interpretation of a collective bargaining agreement dependent on the existence of an express term in the agreement which prohibits or protects the exact conduct complained of, or a term which expressly contradicts the asserted state law right or duty. Such a rule represents a significant, and erroneous, extension of this Court's decision in *Lingle*, and effectively usurps the arbitrator's role as the interpreter of collective bargaining agreements. The application and misapplication of *Lingle's* test for Section 301 preemption has left a perplexing trail of irreconcilable opinions from other circuit courts faced with allegations of fraud similar to those contained in respondents' complaint. The result is unmistakable conflict ripe for resolution by this Court.

The Ninth Circuit's decision also permits employees who make allegations such as respondents' to escape the jurisdictional ambit of the National Labor Relations Board (the "Board"). As the Ninth Circuit acknowledged, under the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.* ("the Act"), employers have a duty to bargain in good faith about the effects of plant closure at a meaningful time and in a meaningful manner. (19a, citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666,

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[1] Respondents base their fraud claims, in part, on state statutes, i.e., Cal. Civ. Code §§ 1708-1711 (West 1985). These provisions merely codify common law elements of the tort, and the statutory underpinning of respondents' claims did not factor in the Ninth Circuit's analysis.

682 (1981).) The court refused to find, however, that Milne's purported conduct would arguably be prohibited under the Act (and thus subject to the Board's primary jurisdiction) despite allegations that Milne failed to disclose its intent to close the plant for at least nine months while it misled employees with promises of job security. (21a.)

The Ninth Circuit similarly held that because the decision to shut down itself is not a mandatory subject of bargaining, the alleged misrepresentations regarding job security did not reflect bad faith bargaining, direct dealing or a direct promise of benefit to employees in circumvention of the union, or a unilateral change in the terms and conditions of employment in violation of the Act. (20a-26a.) Therefore, the court concluded that respondents' claims are not within the Board's exclusive jurisdiction under the principles set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). (26a.) This holding, too, poses a direct and sharp conflict with decisions from this Court, other Circuits and the Board and presents the Court with the need and the opportunity to resolve a conflict involving significant principles of federal and state jurisdiction in an oft-litigated area of labor law.

A. Facts

Respondents' claims arise from alleged conduct by petitioners culminating in the termination of Milne's trucking operations in September 1987 and respondents' layoffs. Respondents allege that between September 1986 and January 1987, petitioners developed a "secret plan or conspiracy" to terminate Milne's operations and lay off Milne's employees, and that over the next nine months, before Milne announced its closing, petitioners intentionally and fraudulently made explicit promises of job security to Milne's employees and asked them to have faith in the company. (3a.)

Over 80 percent of Milne's employees were represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers ("the Teamsters") and covered by the applicable collective bargaining agreements between Milne and the Teamsters. (3a.) The collective bargaining agreements contained detailed provisions relating to job security and setting forth employees' rights if they were discharged or laid off, as well as detailed provisions relating to the closing of any or all of Milne's terminals.[2] (11a.) In addition, the National Master Freight Agreement contained a provision stating: "The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void." (10a.)[3]

From January through July 1987, Milne's operations lost several million dollars. In August of that year, after determining that substantial reductions in wage and benefit levels would be needed for Milne to survive, Milne and its parent, Sun Carriers, formulated a proposal for mid-term wage and benefit concessions. On September 8, 1987, Milne presented its concessions proposal to the Teamsters, stating that unless the proposal was accepted on or before September 11, 1987, Milne would be forced to terminate its operations and lay off its employees. (3a.) The Teamsters rejected Milne's concessions proposal, and on September 11, 1987, Milne began terminating its operations and laying off its employees. (3a.)

Shortly after Milne's closing, the unions filed unfair labor practice charges against Milne before the Board, alleging various forms of bad-faith bargaining in connection with the termination of its operations (2a), allegations substantially different, however, from the allegations in respondents' complaint herein. Each charge was investigated by the Board and each was dismissed or withdrawn in lieu of dismissal.

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[2] For example, Article 8, Section 6(a) of the National Master Freight Agreement, entitled "Change of Operations," provides for a joint employer/union Change of Operations Committee which assumes authority for approving changes in "present terminals" and determining the seniority of affected employees but which "shall observe the Employer's right to designate . . . the operational requirements of the business." Section 6(d)(1) and (2) specifically address employee layoff and seniority rights "[w]hen a terminal(s) is closed and the work of such terminal(s) is eliminated . . . ."

[3] Twenty-five of Milne's employees were mechanics represented by the International Association of Machinists and covered during their employment by a collective bargaining agreement with similar provisions addressing change of operations, layoffs, discharges and other job security matters. Each of the pertinent collective bargaining agreements contained a comprehensive grievance and arbitration provision governing all disputes relating to interpretation of the agreements.

B. Procedural History

On September 8, 1988, respondents filed this action in California state court on behalf of several hundred former union and nonunion Milne employees and their spouses. Respondents assert claims for fraud, misrepresentation, breach of the implied covenant of good faith and fair dealing, tortious interference with contractual relations, interference with prospective economic advantage and intentional infliction of emotional distress. Respondents also asserted claims for loss of consortium on behalf of the spouses, but have abandoned the spousal claims on appeal, as well as a claim for imposition of a constructive trust. (3a-4a.)

Petitioners removed this action to federal court asserting federal question jurisdiction under Section 301. Petitioners answered the complaint, denying that there had ever been any secret plan or conspiracy to close Milne and asserting that, in any event, all of the claims arise under and are preempted by Section 301, because resolution of those state-law claims would require interpretation of Milne's collective bargaining agreements, or, in the alternative, are preempted pursuant to the *Garmon* doctrine. Respondents filed a motion to remand, disclaiming reliance on Section 301 or Milne's collective bargaining agreements and arguing that its claims arise exclusively under state law. The District Court denied respondents' remand motion, based on its determination that the claims brought on behalf of unionized Milne employees and their spouses arise under Section 301. (32a-44a.)

Petitioners subsequently moved for summary judgment on all of the claims brought on behalf of former union employees of Milne and their spouses. The District Court granted summary judgment and dismissed those claims on grounds that they are preempted by Section 301 and barred by the six-month statute of limitations for claims arising under Section 301. The District Court rejected petitioners' contention that summary judgment was also proper under the *Garmon* doctrine. The District Court then remanded respondents' claims brought on behalf of non-union former Milne employees and their spouses to state court, thereby disposing of the case and making its earlier orders as to removal and summary judgment final and appealable. (30a-31a.)

Respondents filed a notice of appeal on June 13, 1989, challenging the District Court's denial of the remand motion as well as the District Court's determination that the claims are preempted by Section 301. The Ninth Circuit affirmed that part of the District Court's judgment which dismissed as preempted the claims for breach of implied covenant of good faith and fair dealing, interference with contractual relations and prospective economic advantage and that part of the claim for emotional distress related to respondents' discharge (13a-17a), thus eliminating any dispute as to the propriety of removal. The Ninth Circuit, however, reversed the District Court's judgment as to the claims for intentional and negligent misrepresentation and fraudulent suppression of facts, concluding that those claims, and the emotional distress claims attendant thereto, were not preempted by Section 301 or the *Garmon* doctrine. (8a-13a, 16a-27a.) Milne's petitions for rehearing and suggestion for rehearing *en banc* were denied when the Ninth Circuit issued its amended decision on May 4, 1992. A motion to stay the mandate pending the filing of this petition for writ of certiorari was granted on June 4, 1992.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S CONCLUSION THAT RESPONDENTS' FRAUD AND EMOTIONAL DISTRESS CLAIMS ARE NOT PREEMPTED BY SECTION 301 IS IN SHARP CONFLICT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

As detailed below, other Circuit Courts of Appeal, including the Second, Seventh and Eleventh Circuits, have, under virtually identical facts, reached a conclusion opposite to the Ninth Circuit's in this case. Each has determined that allegations of fraud based on promises of job security or on a purported failure to disclose an intent to lay off employees requires "interpretation" of the applicable collective bargaining agreements pursuant to this Court's direction in *Lingle*. The federal courts simply do not agree on what this Court contemplated by its articulated test for Section 301 preemption in *Lingle*; in particular, they cannot agree on what is meant by "interpretation" of a collective bargaining agreement. The significant uncertainty which now pervades this area of the law underscores the need for this Court's guidance.[4]

In *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986), several hundred former union employees sued in state court for breach of contract, fraud and breach of state law fiduciary requirements alleging that they had relied to their detriment on promises the plant would stay open until their retirement and alleging the existence of a secret plan to close the plant. 763 F.2d at 1222. After removal, plaintiffs moved to remand, arguing that their state law fraud claims were "separate and independent" from the collective bargaining agreement and therefore not subject to removal under Section 301. *Id.* The Eleventh Circuit upheld removal, finding the claims alleged "termination of employment, wrongful because the employer had represented [that] the employment would continue .... Simply characterizing the claim as a tort claim [for fraud] rather than a breach of contract claim is insufficient to take it out of the policy that such disputes are subject to arbitration." *Id.* at 1224. The court recognized that an attempt under state law to enforce rights in addition to those explicitly or implicitly established by the collective bargaining agreement would be preempted. *Id.* at 1223-24. *Accord Darden v. United States Steel Corp.*, 830 F.2d 1116, 1119-20 (11th Cir. 1987) (Section 301 preempts former employees' claim that employer fraudulently induced them to accept recall by assuring them of job security for at least ten years).

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[4] The Circuits have similarly split over at least two other related issues of Section 301 preemption of state law claims based on alleged promises of job security: (1) whether claims under Section 301 may be preempted on the basis of a defense invoking the collective bargaining agreement (*Compare Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991) (analysis includes defenses) with *Berda v. CBS, Inc.*, 881 F.2d 20, 24-5 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990) (analysis limited to "well-pleaded complaint" and not defenses; court acknowledged that case presents "circuit-splitting" question whether pre-hire promises of job security are preempted by Section 301); and (2) whether pre-hire individual agreements concerning the terms and conditions of a collective bargaining position are enforceable under state law or preempted under Section 301 (*Compare Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987) (pre-hire agreements enforceable) with *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (pre-hire agreements not enforceable under state law).

The Second Circuit, in a case also remarkably similar to this one, concluded that the plaintiffs' common law fraud claims based on layoffs were preempted. In *Dougherty v. American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990), plaintiffs alleged they were fraudulently induced to transfer to a subsidiary of AT&T by the employer's alleged misrepresentations about its plans for or the possibilities of layoffs or consolidation of offices, thereby giving plaintiffs a false sense of job security. 902 F.2d at 202. The Second Circuit determined that the gravamen of plaintiffs' complaint was that the employer had a duty to provide accurate information to employees about its plans and projections relating to the subsidiary's future; obligations "inextricably intertwined" with the collective bargaining agreement which governed layoffs and employment rights of transfer employees. *Id.* at 204. Whether the collective bargaining agreement contained the obligation plaintiffs sought to impose, i.e., to accurately disclose plans for layoffs, was a matter in the first instance for the arbitrator. *Id. See also Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 767-69 (7th Cir. 1991) (interpretation of collective bargaining agreement would be required to resolve claim that employer fraudulently misrepresented it would provide job security to employees upon transfer to other plant; arbitrator would look to agreement's "merger" clause and seniority/layoff provisions to determine whether employees could reasonably rely on promises).

For purposes of analyzing the Section 301 issues presented, the above cases are factually indistinguishable from this case. In each case, the plaintiffs alleged oral promises of job security and a concomitant failure to disclose facts (such as intended layoffs or plant shutdown) material to job security. In each case, union employees were laid off pursuant to the terms of their collective bargaining agreement as a result of change in operations or plant shutdown. Despite this identity of facts and legal issues, the courts reached results which are diametrically opposed to and irreconcilable with the decision in this case.

The Ninth Circuit's decision to reject preemption of the fraud claims rests on the purported "silence" of Milne's collective bargaining agreements with respect to an employee's absolute right to be free of layoffs and Milne's power to discontinue operations. (10a-11a.) The Ninth Circuit determined there was no need to interpret the provisions regarding change of operations, job security and layoffs because the provisions pertain only to rights and procedures "if" the Company closed, not whether it would close. (11a.) In addition, the Court found that the no-conflicting agreements clause would not have to be interpreted, perceiving no "conflict" between the alleged individual promises and the terms of the collective bargaining agreement because no express provision specifically prohibits Milne from making promises of job security. (10a.) Thus, having finished its *own* interpretation of the four corners of the collective bargaining agreement, the Ninth Circuit determined that the agreement permitted the making of individual promises of job security, did not impose on or relieve Milne of a duty to disclose its alleged "plan" to cease operations, did not decisively grant Milne the right to shut down the terminal, and contained no terms that conflict with absolute assurances of job security such that reasonable reliance on the alleged promises would be foreclosed. (9a-13a.)

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), this Court cautioned against precisely the kind of judicial construction of collective bargaining agreements practiced in this case, in which "silence" in the agreement is considered an invitation to interpret a collective bargaining agreement according to state law principles. The Court recognized that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* Such gaps are to be filled in by the arbitrator, whose "source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82.

In accord with *Warrior & Gulf,* this Court, as well as other Circuit Courts, have rejected the view that interpretation of a collective bargaining agreement is required only if an "express" provision in a collective bargaining agreement prohibits the specific conduct in question or poses a direct conflict with individual agreements. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 218-20 (1985) (arbitrator, not state court determines whether contract's implied terms contain asserted rights or duties); *Dougherty,* 902 F.2d at 204 (arbitrator must determine whether relief sought by plaintiffs asserting misrepresentations of job security is "provided, or precluded" by the collective bargaining agreement); *Eitmann,* 730 F.2d at 363 (explicit terms of collective bargaining agreement do not establish its boundaries; dispute regarding company practices not explicitly covered by agreement nonetheless subject to arbitration); *Laws v. Calmat,* 852 F.2d 430, 433 (9th Cir. 1988) (claimed right to privacy in challenge to employer's drug testing program was a working condition "whether or not it is specifically discussed in the CBA"). Thus, interpretation of a collective bargaining agreement — an arbitrator's sole province — extends beyond the document's four corners to include implied terms, retained rights, the law of the shop and practice of the industry.

As the Ninth Circuit observed in this case, Milne's collective bargaining agreements contain provisions governing job security, including change of operations and layoffs. (10a-11a, 15a-16a.) These are quintessential subjects of bargaining and ripe for arbitral interpretation. The very existence of these terms indicates that Milne and the union have bargained about employees' job security and about the protections, rights and duties entailed in plant closure. Had the union desired different job security entitlements for employees, it could, and likely did, promote such proposals in the course of collective bargaining. *See United States Steel Corp. v. Nichols*, 229 F.2d 396, 399-400 (6th Cir.), *cert. denied*, 351 U.S. 950 (1956) (a negotiable right or benefit omitted from written collective bargaining agreement because of lack of agreement necessarily implies failure to acquire it). An arbitrator, looking at the "entire" express and implied content of the collective bargaining agreements, could determine, in fact, that the collective bargaining agreements grant Milne the right to shut down and do not grant absolute job security to employees, posing a clear conflict with the alleged individual promises of job security and foreclosing reasonable reliance, an essential element of respondents' claims for fraud. In addition, contrary to the Ninth Circuit's view (11a), whether Milne had a duty to disclose its intent to lay off employees is not a function of state law but of its contractual agreements with the union. *Darden*, 830 F.2d at 1120; *Dougherty*, 902 F.2d at 203-204.[5]

That the Ninth Circuit was struggling to conform its decision with *Lingle* is manifest. The Ninth Circuit determined, in fact, that, as to respondents' state law contract and contract-based tort claims, the collective bargaining agreements *would* require interpretation to resolve whether the purported misrepresentations would give rise to cognizable claims under state law. The Ninth Circuit found that as to these contract-related claims, interpretation of the collective bargaining agreements was required because the "scope" of the employees' rights to job security is a function of the collective bargaining agreements and the collective bargaining agreements address "what types of disruptions of the contractual or economic relationship between Milne and the employees are allowed." (13a, 16a.) Given these findings, the identical interpretation is required to resolve the fraud claims: if the collective bargaining agreements define the scope of employees' job security rights, then Milne's collective bargaining agreements are a necessary consideration in determining whether the employees could reasonably rely on purported individual promises pledging some different kind of job security.[6]

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[5] Presumably, had the collective bargaining agreements contained an express term giving Milne the absolute right to shut down, the Ninth Circuit would have decided the case differently. (10a-11a.) In fact, the provisions in Milne's collective bargaining agreements governing change in operations point out that only the "employer" may designate the operational requirements of the business to determine change, closure or transfer of terminal operations. (*See* note 2 *supra*.) An agreement could not come much closer to expressly providing that the employer has the absolute right to shut down.

II.

THE DECISION BELOW IS OF NATIONAL IMPORTANCE: SECTION 301 PREEMPTION ENSURES UNIFORMITY IN THE INTERPRETATION OF COLLECTIVE BARGAINING AGREEMENTS AND PRESERVES THE ROLE OF GRIEVANCE AND ARBITRATION IN EMPLOYMENT DISPUTE RESOLUTION.

This Court has long recognized that the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). State law interference with the collective bargaining process "strikes at [its] very core . . . ." *Id.* Accordingly, when state law is invoked to regulate activities which are the subject of a collective bargaining agreement, national labor policy requires that state law yield. In *Lueck*, this Court recognized that a primary purpose of Section 301 preemption is to promote national uniformity in labor relations by preventing the various state courts from applying their own common law principles in the interpretation of collective bargaining agreements. 471 U.S. at 211-213. The opinion below significantly undermines this paramount policy of federal labor law, because it allows precisely the kind of state law intervention eschewed by this Court in *Lueck*, and because it would eviscerate the federal scheme that has been central to labor law and industrial relations for over 30 years.

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[6] As the Ninth Circuit's decision recognized (17a-18a), if respondents' fraud claims are preempted, the derivative emotional distress claims are likewise preempted by Section 301. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987). In addition, the emotional distress claims relate expressly to issues of job security, layoffs and Milne's rights and obligations in changes in company operations — terms and conditions addressed in Milne's collective bargaining agreements — and are accordingly preempted in their own right. *See Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1149-50 (9th Cir. 1988).

While many federal courts have been forthright in rejecting union employees' arguments that allegations of "individual" employment contracts provide rights independent of the collective bargaining agreement, if the decision below and others like it stand, it is inevitable that numerous union employees, unhappy with their collectively bargained agreement, will seek to avoid the terms of their labor contract and the grievance and arbitration remedies negotiated therein by suing in state courts on the basis of independent employment agreements and promises. Indeed, it is abundantly clear that plaintiffs' lawyers are using court decisions as a roadmap to artfully plead claims designed to avoid preemption where, as here, the dispute lies at the heart of matters relegated exclusively to bargaining and arbitration. The Ninth Circuit's mandate that only "express" provisions in a collective bargaining agreement will trigger preemption simply advises a plaintiff's attorney to read carefully the collective bargaining agreement and avoid complaining of any conduct governed by its express terms.[7]

Closely related to the loss of national uniformity in interpretation of collective bargaining agreements is the obvious disintegration of the arbitration process. If this decision evidences a trend, the role of the collective bargaining agreement will become subservient to an employer's stray remarks and passing comments about working conditions which, it will be urged, are "independent" of the collective bargaining agreement because they are not identical to it. The decision eviscerates a longstanding principle that the collective bargaining agreement — as interpreted by the arbitrator — defines the terms and conditions of employment. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (permitting union employees to "sidestep" grievance procedures deprives employers and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances).

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[7] Demonstrating how seriously *Lingle* has been misconstrued, one lower federal court has implicitly concluded that Section 301 will *never* preempt a fraud claim based on alleged individual promises regarding a term or condition of employment, even when the alleged representation virtually *mirrors* the collective bargaining agreement. *Walton v. UTV of San Francisco*, 776 F. Supp. 1399 (N.D. Cal. 1991) (fraud claim based on individual promise of "good cause" discharge not preempted by existence of "just cause" provision in collective bargaining agreement).

The Ninth Circuit's willingness to substitute state tort actions for grievance and arbitration remedies is contrary to congressional mandate. Not only does the Ninth Circuit's rule in this case foster abandonment of grievance and arbitration provisions by employees, the rule will also discourage employers, particularly small employers, from adopting such provisions in the first instance. Employers will likely refuse to agree to contract terms which enhance the prospect of litigating employment disputes in two forums. The Court in *Republic Steel* stated:

> "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. [citation omitted.] Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. . . . [C]onscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be

> made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103." 379 U.S. at 653.

This Court has previously recognized, then, that the questions presented by the decision below are substantial. Milne has no quarrel with the notion of permitting truly "independent," state law claims to proceed in state court under state law. It is essential, however, that this Court reaffirm that the collective bargaining agreement is the sole source of a union employee's remedy for violations of terms and conditions of employment, that employees cannot rely on individual agreements that concern the terms and conditions of a job covered by a collective bargaining agreement, and that federal law is the sole regulator of the collective bargaining relationship.

III.

THE NINTH CIRCUIT'S CONCLUSION THAT THE ALLEGED CONDUCT IS NOT WITHIN THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD CONFLICTS WITH AUTHORITY FROM THIS COURT, OTHER CIRCUIT COURTS OF APPEALS AND THE BOARD.

Petitioners submit that the alleged misrepresentations of job security and Milne's purported failure for nine months to disclose its purported plan to shut down, if indeed true, constitute conduct "arguably prohibited" by the Act and that accordingly, respondents' state law claims based on that conduct are preempted under the principles of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The Ninth Circuit rejected the contention that the state law allegations evidenced bad-faith bargaining (in violation of Section 8(d) of the Act), direct dealing with represented employees (in violation of Section 8(a)(5)), individual promises of employment benefit (in violation of Section 8(d)), or a unilateral change in the collective bargaining agreement (in violation of Section 8(a)(5)). The

Ninth Circuit premised its decision on four principal points: the alleged promises concerned plant closure over which there is no mandatory duty to bargain, the alleged promises were not made in the course of collective bargaining, the state law claims and unfair labor practice charges would not present the "identical" controversy, and the state's interest in such conduct is "deeply rooted in local feeling and responsibility." (18a-26a, quoting *Garmon*, 359 U.S. at 243-44). The Ninth Circuit's decision — and its analysis — conflicts sharply with this Court's decisions, decisions from the Sixth, Seventh and Eleventh Circuits, as well as the Board, and sets a precedent which seriously undermines 30 years of federal labor policy.

Courts of Appeals considering cases with virtually identical legal claims to those alleged by respondents have agreed uniformly that claims based on misrepresentations concerning job security related to plant closure are preempted under the principles of *Garmon*. *See, e.g., Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) (former employees' allegations that employer fraudulently announced an intent to rebuild plant, both to union during concession negotiations and to employees after concession agreement reached, stated arguable violation of Section 8(d), thus preempting state law claims); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (substance of former employees' claims over alleged fraudulent concealment of fact plant was closing, despite negotiations over concessions, was the same as claim for bad-faith bargaining under Act and was therefore preempted); *Kolentus v. Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987) (claim that employer, while negotiating pension agreements, committed fraud by failing to disclose that plant would close was indistinguishable from unfair labor practice claim before Board). *See also Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co.*, 220 Cal. App. 3d 1402 (1990) (union's state law claim for fraud based on employer's failure to disclose impending plant closure was preempted because it was, in essence, a claim that the employer failed to give timely and accurate notice to the union as part of its obligation to bargain in good faith over effects of closure). None of the Ninth Circuit's reasons for rejecting *Garmon* preemption distinguish this case from the above cited authority; the cases present a patent and significant conflict.

The Ninth Circuit is correct that under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), an employer, indeed, is generally free to shut down part of its business for economic reasons without first bargaining about the decision. As the Ninth Circuit points out, respondents in this case allege a "secret plan or conspiracy" to shut down Milne, a decision within its unfettered discretion to make. Yet even the Ninth Circuit repeatedly acknowledges that the allegedly fraudulent conduct on which the state law claims are based concern explicit "promises of job security." (3a, 10a-11a, 13a.) Unlike the decision to close, job security is unquestionably a matter for collective, rather than individual, bargaining. *See Darden v. United States Steel Corp.*, 830 F.2d at 1120 (employer's representations that employees would enjoy job security for at least 10 years clearly within ambit of collective bargaining).

Furthermore, although an employer retains the right to close a plant for economic reasons, this Court has determined that the duty to bargain includes a duty, enforceable by the Board, to give "timely" notice of closing to the union and to bargain over matters of job security concomitant to plant closure. Such "effects bargaining" has its own obligation of good faith, which requires that negotiations over effects must occur "in a meaningful manner and at a meaningful time." *First National Maintenance*, 452 U.S. at 681-82.

It is, at minimum, "arguable" that "timely" notice and bargaining at a "meaningful time" mean that notice and opportunity to bargain must be given when the decision to close is made. *See Serrano*, 790 F.2d at 1286; *Kolentus*, 798 F.2d at 960-61. *See also Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 459-60 (1982) (two-day notice to union that plant would shut down did not violate duty to bargain meaningfully over effects of closing, since employer had not made decision substantially in advance of two-day notice, had not deceived union or employees, and had earlier discussed its financial difficulties with union). According to respondents' own allegations in this case, Milne made the decision to close at least nine months prior to the announcement, and it is

Milne's purported delay in disclosing its decision and its financial difficulties that lies at the heart of respondents' complaint. (3a.)[8] If those allegations were true, petitioners' conduct would unquestionably constitute bad-faith bargaining in violation of Section 8(a)(5) and 8(d). *See NLRB v. National Car Rental System, Inc.*, 672 F.2d 1182 (3d Cir. 1982) (employer's notice to union given only after employer had already decided to terminate rather than reassign employees rendered futile any effects bargaining and violated Act).

In addition, because the duty to bargain over effects extends to the union (*First National Maintenance*, 452 U.S. at 681-82), it is, at minimum, "arguable" that bargaining in a "meaningful manner" contemplates truthful representations made in the course of collective bargaining, not fraudulent representations made directly to employees. Even if the Ninth Circuit is correct that promises of job security in this context are not a mandatory subject of bargaining and do not violate the Act even if fraudulent or made directly to employees, bargaining over effects of plant closure unquestionably is a mandatory duty. An employer's violation of the obligation of good-faith bargaining attendant to plant closure is redressable exclusively by the Board, and state law claims premised on such conduct are preempted. *Serrano*, 790 F.2d at 1287; *Peterbilt Motors Co.*, 220 Cal. App. 3d at 1409. Respondents' allegations that Milne purportedly waited nine months to tell the union it had decided to close and, in the interim, misled the employees with promises of job security, would indisputably undermine any notion that Milne met its "meaningful manner" and "meaningful time" bargaining obligations. Accordingly, the Ninth Circuit's decision is irreconcilable with *First National Maintenance*, the *Serrano* line of authority and Board precedent.

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[8] Respondents' complaint states that Milne's September 8, 1987 letter, requesting concessions from the Teamsters, was "the first time [petitioners] ever communicated to [respondents] anything concerning their long-standing secret plans . . ." and that "there was no time for the Teamsters to respond" before the September 11, 1987 shutdown. These allegations articulate precisely a claim for bad faith bargaining over effects of plant closure under *First National Maintenance*.

Contrary to the Ninth Circuit's view, the fact that formal negotiations were not pending when the alleged misrepresentations were made does not determine whether the conduct is "arguably prohibited or protected" under the Act. *See Serrano*, 790 F.2d at 1283 (fraudulently misleading employees, after the conclusion of collective bargaining, that the plant would remain open violates Section 8 of the Act, because "the duty to bargain unquestionably extends beyond the period of contract negotiations"). Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract." *Conley v. Gibson*, 355 U.S. 41, 46 (1957). This Court and the Board have consistently held that directly bargaining over terms and conditions of employment with represented employees or unilateral changes in the contract during its term are unfair labor practices whenever a union is certified to represent the pertinent employees, regardless of the status of formal bargaining. *See, e.g., Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *NLRB v. Katz*, 369 U.S. 736 (1962); *Martin Marietta Energy Systems and Oil, Chemical and Atomic Workers International Union*, 283 N.L.R.B. 173 (1987), *enforced*, 842 F.2d 332 (6th Cir. 1988) (employer implemented health benefit plan for employees during term of collective bargaining agreement in violation of Section 8(a)(5)).

Also contrary to the Ninth Circuit's decision, elements of the state law claims are identical to elements of an unfair labor practice arguably covered by the Act, and the state action is preempted. *See Operating Engineers v. Jones*, 460 U.S. 669, 681-83 (1983). Respondents' allegations unequivocally accuse Milne of failing to divulge for at least nine months its "secret" plan to shut down. The Ninth Circuit recognized that the duty to or failure to disclose material facts is a critical element of each fraud count. (9a.) *See Cicone v. URS Corp.*, 183 Cal. App. 3d 194, 201 (1986). The Ninth Circuit refused to acknowledge, however, that Milne's adherence to the identical duty, i.e., to timely disclose an intent to shut down operations, would likewise determine the outcome of an unfair labor practice charge over effects bargaining.[9] *See Chippewa Motor Freight*, 261 N.L.R.B. at 460; *National Car Rental System*, 672 F.2d at 1191.

Each cause of action in respondents' complaint is also premised on an alleged representation of job security made directly to individual unionized employees, elements of the state law claims which reflect, in substance, elements the Board would examine to determine if Milne's conduct was prohibited under the Act as: a unilateral change in a collective bargaining agreement (*see, e.g., Martin Marietta Energy Systems and Oil, Chemical & Atomic Workers International Union*, 283 N.L.R.B. 173 (1987), *enforced*, 842 F.2d 332 (6th Cir. 1988)); bad-faith or fraudulent bargaining (*see, e.g., Serrano*, 790 F.2d at 1287; *Penntech Papers, Inc.*, 263 N.R.R.B. 264 (1982), *enforced*, 706 F.2d 18 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983)); direct dealing with employees (*see, e.g., Union Carbide Corp.*, 275 N.L.R.B. 197 (1985)); or individual promises of a benefit in circumvention of the union (*id.*)). In concluding that the state law claims do not present the same controversy as would be before the Board, the Ninth Circuit again simply departs, without justification, from *First National Maintenance*, the *Serrano* line of authority, and Board precedent.

Similarly, the Ninth Circuit's view that the state's interest in preventing fraud overrides the regulatory concerns of the Act departs radically from analogous precedent from other Circuits.

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[9] The fact that the Board dismissed the unfair labor practice charges brought after Milne's closure supports petitioners' position, contrary to the Ninth Circuit's analysis. Simply put, respondents' state law allegations were never presented to the Board. That Milne's conduct was exonerated by the Board in the charges presented is immaterial to the question of primary jurisdiction over the complaint as now stated. *Serrano*, 790 F.2d at 1287. Indeed, the Ninth Circuit's suggestion (at 21a) that the Board's dismissal of the charges implied that Milne satisfied its effects bargaining obligation begs the question. "[A] claim, that the NLRB would not be able to help . . . because subsequent effects bargaining in fact fulfilled the section 8, subdivision (a)(5) duty, at most presents an arguable dispute as to the NLRB's ultimate view of the case; and where NLRB jurisdiction to fashion a remedy is even arguable, we must defer to the NLRB." *Peterbilt Motors Co.*, 220 Cal.App.3d at 1410.

These cases have uniformly held that allegedly fraudulent promises regarding job security and failure to timely disclose a plan to shut down operations constitute conduct *integral* to the Act, not peripheral to it, and that a state's interest in preventing fraud, while substantial, does not override that federal interest. *Parker*, 855 F.2d at 1518; *Serrano*, 790 F.2d at 1287, *Kolentus*, 798 F.2d at 961. *See also Peterbilt Motors Co.*, 220 Cal. App. 3d at 1410.

The importance of the conflicts presented by the Ninth Circuit's decision cannot be overstated, not only with respect to this case but with regard to the *Garmon* doctrine that has helped define labor-management relations for more than 30 years. The Ninth Circuit's test for *Garmon* preemption would permit piecemeal agreements with employees — portions collectively bargained and portions unilaterally granted, and would permit the collective bargaining relationship to be enforced, in part, under federal law and, in part, under state law, resulting in uncertainty in the collective bargaining relationship and the meaning of agreements and a diminution of the role of the union in bargaining for and enforcing represented employees' job security rights. Such a result is antithetical to the eradication of industrial strife and the preservation of the balance of power which Congress sought to promote in the Act. *See Medo Photo Supply Corp.*, 321 U.S. at 684. The result urged by petitioners and mandated by the authority cited herein would not in any way have deprived respondents of remedies for the wrong alleged, but rather, would have confined those remedies to the Board consistent with the long-standing mandate of Congress and this Court to protect the Board's primary jurisdiction.

CONCLUSION

For the foregoing reasons, petitioners pray that the Court issue a writ of certiorari to review the decision and judgment below.

Respectfully submitted

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Rule 29.1 Statement. The subsidiaries and parent companies of Sun Carriers, Inc., Milne Truck Lines, Inc., Jones Truck Lines, Inc. and St. Johnsbury Trucking Company, Inc., other than wholly-owned susidiaries, are as follows: JTL Holding Company, JTL Intermediate Company, SCI Holding Corporation.

No. 89-15837

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit
Corporation, or in the alternative Steven Bishop,
Charles E. Tharp, Debra Bishop and Ella Tharp,
as representatives of the class of affected former employees of
Milne Truck Lines, Inc., and their spouses,
Plaintiff-Appellant,

v.

SUN CARRIERS, INC.; ALBERT L. LABINGER;
DONALD E. MAYORAS; MILNE TRUCK LINES; ELLIOTT
BURNSIDE; CHARLES N. PASS; THOMAS MORTON; JAMES
BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK LINES;
RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN;
BRADFORD M. FREEMAN; RONALD P. SPOGLI,
Defendants-Appellees.

D.C. No. CV-88-4028-CAL

OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding.

Argued and Submitted
December 11, 1990 — Pasadena, California

Filed November 20, 1991
Amended May 4, 1992

Before: Alfred T. Goodwin, Otto R. Skopil, Jr., and
Robert Boochever, Circuit Judges.

Opinion by Judge Boochever

BOOCHEVER, Circuit Judge:

Milne Employees Association ("MEA" or "employees") appeals from the district court's summary judgment in favor of Sun Carriers, Inc., Milne Truck Lines, and other defendants. The district court concluded that MEA's various state law claims were preempted by section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) (1988) ("section 301"), and consequently were barred by the applicable six-month statute of limitations period.

The primary issue in this appeal is whether these state law claims are preempted by section 301. We reverse and remand the dismissal of MEA's claims for fraud, negligent misrepresentation of facts, suppression of facts, and intentional infliction of emotional distress, insofar as the emotional distress claim arises from defendants' allegedly fraudulent conduct. We affirm the dismissal of MEA's claims for breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and interference with prospective economic advantage. We also affirm the dismissal of defendants' motion for summary judgment as it relates to *Garmon* preemption.

FACTUAL BACKGROUND

Plaintiff Milne Employees Association is an entity consisting of 566 former employees of defendant Milne Truck Lines, Inc. ("Milne") and their spouses.[1] More than 80 percent of Milne's employees were represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers ("Teamsters"), and the terms of their employment were governed by two collective bargaining agreements.[2] From approximately 1930 to 1980, Milne operated as an independent trucking company. In 1980, defendant Sun Carriers, Inc. acquired Milne. On September 29, 1986, Sun officers and defendants Riordan, Freeman, and Spogli purchased all of Sun's stock in a leveraged buy-out. At some point between that date and January 1987, MEA claims that all the defendants (collectively, "Employer") secretly planned to liquidate Milne's assets to pay the leveraged buy-out debt. After January 1987, although Milne allegedly was reducing its sales and marketing forces, Milne management visited with employees at various Milne terminals in an effort to address industrywide rumors of the company's imminent closing. During these meetings, management allegedly made speeches and presented videotapes promising the employees job security, asking them to have faith in the group controlling defendant Sun, and asking them to refrain from seeking other employment. In August 1987, Employer sold two Milne terminals but represented the sales to employees as a "revamping" or as a "blend[ing]" of operations with other Milne terminals. MEA claims that all of these actions were "efforts to deceive, mislead and conceal" from Milne employees Employer's true intentions to liquidate the company.

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[1] Originally, MEA was comprised of 614 former employees and 480 spouses but the claims of 48 managerial and nonunion employees were severed and remanded to state court.

On September 8, 1987, Milne requested numerous wage and benefit concessions from the Teamsters and stated that failure to agree to the concessions by September 11 would force Milne to shut down due to financial difficulties. On September 11, 1987, Employer closed all of Milne's 33 locations, liquidated its assets, and began terminating Milne employees.

One year later, MEA filed a complaint in California state court, bringing the following state tort and contract claims[3] based on Milne's alleged promises: fraud, negligent misrepresentation, suppression of facts, breach of the implied covenant of good faith and fair dealing, interference with contractual relations, interference with prospective economic advantage, and intentional infliction of emotional distress. Employer removed the case to federal court, and MEA moved to remand the case back to state court. On January 31, 1989, the district court held, 1) that the defendants other than Milne who were nonsignatories to the collective bargaining agreements, had standing to remove their cases to federal court on the basis of section 301 preemption, and 2) that all claims of the unionized former employees and their spouses were completely preempted by section 301 of the Labor Management Relations Act. On May 15, 1989, the district court finalized its order granting all defendants summary judgment as to all claims of the former unionized employees and their spouses, on the grounds that the claims were preempted by section 301 and barred by the applicable six-month statute of limitations. The district court also denied defendants' motion for summary judgment on the basis of *Garmon* preemption and remanded the nonunion employees' claims to state court. The former unionized employees now appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

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[2] In addition, 25 of Milne's employees were union mechanics represented by the International Association of Machinists ("IAM"), and the terms of their employment were governed by a separate collective bargaining agreement.

[3] On appeal, MEA has not briefed the issues of imposition of a constructive trust and loss of consortium, which were alleged as

STANDARD OF REVIEW

The propriety of removal of a state action to federal court is a question of federal jurisdiction and is subject to *de novo* review. *Jackson v. Southern Cal. Gas Co.*, 881 F.2d 638, 641 (9th Cir. 1989). We also review *de novo* both the district court's grant of defendants' summary judgment motion based on section 301 preemption and its denial of that portion of defendants' summary judgment motion relating to *Garmon* preemption. *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1060 (9th Cir. 1989).

Claims VIII and IX in their original Complaint. Hence, we consider only Claims I-VII on this appeal.

DISCUSSION

I

Removal Jurisdiction

Title 28 U.S.C. § 1441(a) provides that a defendant may remove from state to federal court any civil action over which the district court would have had original jurisdiction. Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988). Federal jurisdiction exists only if the federal question appears on the face of the plaintiff's "well-pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936). Thus, under the well-pleaded complaint rule, a defendant cannot remove a state law claim to federal court even if a defense, including the defense of preemption, is based on federal law. *Hunter v. United Van Lines*, 746 F.2d 635, 639 (9th Cir. 1984), *cert. denied*, 474 U.S. 863 (1985).

[1] The "complete preemption" doctrine, however, stands as an independent corollary or exception to the well-pleaded complaint rule. *Caterpillar*, 482 U.S. at 393. Under this doctrine, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* Plaintiffs cannot avoid removal by "artfully pleading" only state law claims that are actually preempted by federal statutes such as section 301 of the Labor Management Relations Act. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 (9th Cir. 1987). Thus, if a state law claim is completely preempted by a federal statute such as section 301, the state law cause of action necessarily becomes a federal one and can be removed.

[2] MEA asserts that all of the named defendants except Milne were cosignatories to the collective bargaining agreements ("CBAs") and therefore did not have standing under section 301 to remove the case from state to federal court. We disagree.

MEA relies primarily on *Karo v. San Diego Symphony Orchestra Ass'n*, 762 F.2d 819 (9th Cir. 1985). There, the issue was whether a nonsignatory had standing to bring a hybrid suit for breach of a collective bargaining agreement and breach of the duty of fair representation. *Id.* at 820. Because the plaintiff was neither a member of the bargaining unit nor a third party beneficiary of the agreement, we concluded that he lacked standing to enforce a provision in the agreement. MEA asserts that *Karo* necessarily lead to the conclusion that, first, a nonparty to a CBA whose duties are not defined in the contract cannot be sued for breach of the contract and, second, a party who cannot be sued for breach of a CBA cannot raise a federal labor contract defense to a state tort claim.

Karo, however, did not present an issue of preemption, because that case involved a section 301 suit brought in federal court. The primary issue was merely whether Karo had rights under the CBA and, thus, had standing to sue for its breach. Assuming that Karo had brought suit in state court and that the question of his standing to enforce the CBA required interpretation of the CBA, his claim might well have been subject to preemption. Contrary to MEA's belief, then, our holding in *Karo* does not prevent a nonsignatory to an agreement from raising the issue of section 301 preemption to remove a case to federal court.

[3] In resolving this issue, we find controlling our decision in *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm.*, 707 F.2d 1067 (9th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) (*Painters*). That case presented the related question of "whether a non-signatory to a collective bargaining agreement was a proper party to a suit brought under § 301(a)." *Id.* at 1068-69. Answering the question in the affirmative, we stated:

> Section 301(a) does not contain any requirement that the parties to an action brought thereunder must also be the parties to the alleged breached contract. . . .
>
> . . . .
>
> All that is required for jurisdiction to be proper under § 301(a) is that the suit be based on an alleged breach of

> contract between an employer and a labor organization and that the resolution of the lawsuit be focused upon and governed by the terms of the contract.

Id. at 1071 (citation omitted). In holding that a federal court may exercise jurisdiction over a state breach-of-contract claim against a nonsignatory in a section 301 action, *Painters* necessarily implied that a nonsignatory defendant in state court would have standing to remove the case to federal court under section 301. *Cf. Bloom v. Universal City Studios, Inc.*, 734 F.Supp. 1553, 1559 (C.D. Cal. 1990) (section 301 can preempt state law claim against defendants who did not sign CBA), *aff'd*, 933 F.2d 1013 (9th Cir. 1991); *Brown v. Keystone Consol. Indus., Inc.*, 680 F.Supp. 1212, 1220-22 (N.D. Ill. 1988) (same). If a nonsignatory is a proper party under section 301, it would be anomalous to bar that same party from raising section 301 preemption as a basis for removal.

[4] Our conclusion is also consistent with the federal policy favoring the interpretation of collective bargaining agreements under a uniform body of federal labor law. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Assuming that a state law claim requires interpretation of the CBA and thus would be preempted under section 301, *see Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988), preventing nonsignatories from removing such claims, while allowing signatories to remove the same claims, raises the distinct possibility of state and federal courts interpreting the same CBA provisions in an inconsistent manner. Because *Painters* dictates that nonsignatories can be parties to a section 301 action when a section 301 action is artfully pleaded as a state law claim, we hold that a nonsignatory to a CBA has standing to remove a case on the basis of section 301 preemption if resolution of the state law claim requires interpretation of the collective bargaining agreement.

II

Section 301 Preemption of State Law Claims

[5] MEA next contends that the employees' state law claims are not completely preempted by section 301, and thus, that the district court improperly exercised jurisdiction over the suit. In enacting section 301 of the Labor Management Relations Act of 1947,[4] Congress intended to ensure that the collective bargaining agreements are interpreted uniformly. *Lingle*, 486 U.S. at 404 & n.3 (quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962)); *Allis-Chalmers*, 471 U.S. at 209-10 (same). To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim requires the interpretation of a collective bargaining agreement. *Lingle*, 486 U.S. at 413; *see also Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514, 1517 (9th Cir. 1988) (state law claim is not preempted if "the state law factual inquiry [does] not turn on the meaning of any provision of the collective bargaining agreement"). Such an analysis furthers the purpose of section 301 preemption doctrine "that federal law will be the basis for interpreting collective-bargaining agreements," while leaving undisturbed "the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Lingle*, 486 U.S. at 409.

A. *Fraud and Misrepresentation Claims*

We therefore turn to MEA's claims to determine whether their resolution requires interpretation of the collective bargaining agreements. *Lingle* dictates that we begin by setting forth the elements of each state law claim. *Lingle*, 486 U.S. at 407.

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[4] Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1988).

MEA alleges three fraud-related claims: intentional misrepresentation of facts, negligent misrepresentation of facts, and suppression of facts. The claims are based in part on California statutes, *see* Cal. Civ. Code §§ 1709-1710, 1711 (West 1985), and reflect California's legislative declaration that "[e]very person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights." Cal. Civ. Code § 1708 (West 1985). With exceptions noted below, the common elements of these fraud claims are: (1) a misrepresentation, such as a false representation or a concealment of fact; (2) knowledge of falsity or concealment; (3) intent to defraud, *i.e.*, to induce reliance; (4) justifiable reliance; and (5) resulting damage. *See Cicone v. URS Corp.*, 183 Cal. App. 3d 194, 200, 227 Cal. Rptr. 887, 890 (1986). The negligent misrepresentation claim does not require intent; that is, the defendant may be liable even if he honestly believed the false statements to be true, so long as no reasonable grounds existed for such a belief. *Id.* at 208 (quoting *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104, 111, 128 Cal. Rptr. 901, 906 (1976)). Further, the suppression of facts claim generally requires a duty to disclose the concealed fact. *La Jolla Village Homeowners' Ass'n, Inc. v. Superior Court*, 212 Cal. App. 3d 1131, 1151-52, 261 Cal. Rptr. 146, 158-59 (1989).

Resolution of the first three elements — misrepresentation, knowledge of falsity, and intent to defraud — does not require interpretation of the employees' collective bargaining agreements. Instead, it turns on Milne's state of mind and involves "purely factual questions pertain[ing] to . . . the conduct and motivation of the employer." *Lingle*, 486 U.S. at 407.

The fourth element, justifiable reliance, requires a two-part analysis. Initially, reliance must be established. The employees must show that they acted upon Milne's representations by, for example, buying homes and cars, sending children to college, and refraining from looking for other jobs. This, too, is a "purely factual inquiry pertain[ing] to the conduct of the employee[s]." *Id.* Then, the reliance must be shown to have been justified. The employees must show that the "circumstances were such to make it *reasonable* for plaintiff to accept defendant's statements without an independent inquiry or investigation." *Wilhelm v. Pray, Price, Williams & Russell,* 186 Cal. App. 3d 1324, 1332, 231 Cal. Rptr. 355, 358 (1986) (citing 4 B.E. Witkin, Summary of Cal. Law § 475 (8th ed. 1974)). Because the employees knew at the time of the alleged fraud that their employment with Milne was governed by collective bargaining agreements, they must prove that their reliance was justified in light of the agreements.

Defendants contend that such a showing requires interpretation of the collective bargaining agreements, thus triggering preemption under section 301. For example, one CBA provision renders null and void any agreement between the employer and employees which "in any way conflicts" with the terms of the collective bargaining agreement.[5] An examination of the collective bargaining agreements, however, reveals no provision or term which arguably conflicts with Milne's promises regarding its continued operations and employee job security, that would call for interpretation to determine whether a conflict actually exists. No provision in the agreement prohibits Milne from promising employees that the company will remain open or that their jobs will continue. Conversely, none of the provisions requires nor regulates promises of continued company operation. Therefore, contrary to Milne's belief, there is no need to construe or apply the provision prohibiting agreements that conflict with the collective bargaining agreement.

The defendants also argue that provisions addressing the procedures to be followed in the event of layoffs, plant closings, and changes of operations, require interpretation because MEA alleges that Milne made misrepresentations regarding employee job security.[6] Defendants, however, fail to explain why these provisions require interpretation when MEA's claims arise from alleged promises that the company would not close, and not from promises regarding rights or procedures entitled to them if the company closed. Although a court resolving MEA's fraud claims certainly will be required to interpret or analyze the alleged extracontractual promises, it would have no occasion to interpret the collective bargaining agreement itself, in part because these fraud claims do not originate in or refer to rights and duties derived from the collective bargaining agreement.

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[5] The provision specifically states:

> The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

National Master Freight Agreement, art. 6, § 2.

[6] Evaluation of the fifth element of the three fraud claims — damages — does not require interpretation of the collective bargaining agreement either. MEA must merely prove facts about the type and degree of damage the employees have suffered from the alleged fraud. And finally, the additional element of the suppression cause of action, a duty to disclose, does not require such interpretation. The duty to disclose does not stem from the collective bargaining agreement; instead, it arises out of state law obligations imposed on a party in a fiduciary relationship, a party actively concealing indisclosed matters, or a party to a transaction who is privy to material facts unaccessible to the plaintiff. *Goodman v. Kennedy*, 18 Cal.3d 335, 346-47, 556 P.2d 737, 745, 134 Cal. Rptr. 375, 383 (1976). In sum, none of the elements of the fraud, misrepresentation, or suppression claims requires interpretation of the collective bargaining agreements.

We note that although we have examined the collective bargaining agreements to determine whether the employees' claims are preempted, we were not required to interpret them. The term "interpretation" is defined narrowly in this context. To determine whether federal jurisdiction is properly exercised over a state law claim brought by unionized employees, a federal court necessarily examines the collective bargaining agreement to determine whether the state law claims are "artfully pleaded" claims which actually allege breach of contract or require interpretation of the collective bargaining agreement's terms. Nonetheless, such an examination is not interpretation. If it were, the section 301 preemption doctrine would swallow the rule that employees covered by collective bargaining agreements are entitled "to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 396. *Cf. Allis-Chalmers*, 471 U.S. at 211 ("not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . .").

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[6] For example, one such provision states:

> When a terminal(s) is closed and the work of such terminal(s) is eliminated, an employee who was formerly employed at another terminal shall have the right to return to such former terminal and exercise his continuous classification [and] seniority, provided, he has not been away from such former terminal for more than a three (3) year period.

National Master Freight Agreement, art. 8, § 6, at 39.

Finally, Milne and the other defendants urge us to apply cases which have required plaintiffs alleging fraud and misrepresentation claims "to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made." *Bale v. General Tel. Co. of Cal.*, 795 F.2d 775, 780 (9th Cir. 1986); *accord Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 1001 (9th Cir. 1987). Resolution of MEA's state tort claims, defendants argue, "is therefore 'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.' " *Bale*, 795 F.2d at 780 (quoting *Allis-Chalmers*, 471 U.S. at 220); *accord Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1049 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987). A critical distinction, however, exists between these cases and the case before us. The majority of cases involving fraud claims brought by unionized employees present facts requiring interpretation of a specific provision or term of a collective bargaining agreement to resolve the state law claims. *See, e.g., Young*, 830 F.2d at 996 (alleged fraudulent misrepresentation regarding terminations conflicted with provision governing probationary employees); *Stallcorp*, 820 F.2d at 1047, 1049 & n.3 (alleged fraudulent misrepresentation regarding work responsibilities made in connection with a written reinstatement agreement depended upon interpretation of a collective bargaining agreement); *Bale*, 795 F.2d at 777, 779-80 (resolution of fraud claims required interpretation of collective bargaining agreement definitions of "temporary" and "regular" employees). In each of these cases, the allegedly breached oral agreement represented a departure from the terms of the collective bargaining agreement; therein lay the alleged misrepresentation. In contrast, MEA asserts here that the alleged promise not to shut down the company differed from the defendants' secret plans to the contrary. As a result, resolution of these fraud claims does not require interpretation of specific terms or provisions in the collective bargaining agreement; indeed, the defendants' conduct in promising continued company operations and job security in the face of ill financial health was not addressed or foreseen in the collective bargaining agreement. Given the unique facts alleged in this case, then, both our conclusions here and in the *Bale* line of cases remain consistent with the analysis dictated by *Lingle*. *See generally Allis-Chalmers,* 471 U.S. at 220 ("The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."). Accordingly, we find that the fraud claims are not preempted and that, therefore, the district court improperly exercised jurisdiction over these claims.

B. *Breach of Implied Covenant of Good Faith and Fair Dealing*

Next, the employees allege that the defendants breached the implied covenant of good faith and fair dealing arising under common law. *See Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 727-28 (1980). They claim that, implied in their employer-employee relationship with Milne, there was a covenant of good faith and fair dealing under which Milne and the other defendants would do nothing to prevent or hinder the employees' ability to enjoy their employment and accompanying financial benefits. Thus, in making the alleged false representations and closing Milne, the employees argue, the defendants breached this covenant of good faith.

[7] Under California law, a claim for breach of this implied covenant is necessarily based on the existence of an underlying contractual relationship, and the essence of the covenant is that neither party to the contract will do anything which would deprive the other of the benefits of the contract. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. of Cal.*, 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984). This cause of action developed in the employment context to protect the job security of at-will employees who could be fired without cause under common law. No comparable lack of job security, however, generally exists for unionized employees, whose employment relationship is governed by a collective bargaining agreement. *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1147 (9th Cir. 1988) (citing *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1373 n.9, 1374-75 n.11 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985)). Therefore, we have generally held that section 301 preempts the California state cause of action for breach of the implied covenant of good faith and fair dealing when an employee enjoys comparable job security under a collective bargaining agreement. *See, e.g., Cook v. Lindsay Olive Growers*, 911 F.2d 233, 238-39 (9th Cir. 1990); *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1286 (9th Cir. 1989); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 999 (9th Cir. 1987).

[8] Here, MEA concedes that the underlying contracts, with respect to the unionized employees, are the collective bargaining agreements. In order to resolve whether the defendants' conduct has deprived the employees of their rights under the employment contract, a court would be required to interpret the collective bargaining agreement to determine the scope of those rights. Thus, we find that MEA's claim for breach of the implied covenant of good faith and fair dealing is preempted and that the cause of action was properly removed to the district court. We affirm the district court's holding that this claim was time-barred due to the expiration of the six-month statute of limitations for section 301 claims. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 155 (1983).

C. *Interference with Contractual Relations and Prospective Economic Advantage*

MEA also alleges the claims of interference with contractual relations against all defendants other than Milne, and interference with prospective economic advantage against all defendants. Specifically, the employees allege that the interference and intrusion of the non-Milne defendants led Milne to terminate the employees and deprived them of opportunities to earn a living and to seek alternative employment earlier. As to the claim of interference with prospective advantage, MEA contends that the employees had the prospective advantages of continued earnings in the future and the ability to seek similar employment at other trucking industry jobs, and that the defendants interfered with these prospective advantages when they closed down Milne without notice, terminated the employees, and forced the employees to look for other jobs.

The essential elements of a claim for interference with contractual relations are: "1) a valid contract between plaintiff and a third party; 2) defendant's knowledge of this contract; 3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; 4) actual breach or disruption of the contractual relationship; and 5) resulting damage." *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126, 791 P.2d 587, 589-90, 270 Cal. Rptr. 1, 3-4 (1990). The tort of interference with prospective economic advantage does not require proof of a legally binding contract, but does require: 1) an economic relationship between plaintiff and a third party, with the probability of future economic benefit to the plaintiff, 2) defendant's knowledge of the relationship, 3) intentional acts by the defendant designed to disrupt the relationship, 4) actual disruption of the relationship, and 5) proximately caused economic harm to the plaintiff. *Id.* at 1126 & n.2 (quoting *Youst v. Longo,* 43 Cal. 3d 64, 71 n.6, 729 P.2d 728, 233 Cal. Rptr. 294 (1987)).

Resolution of these claims will require interpretation of provisions in the collective bargaining agreements. As defendants point out, a court could not determine whether they induced a breach of the employees' contracts with Milne without construing the terms of the underlying contracts. Because the collective bargaining agreements address what types of disruption of the contractual or economic relationship between Milne and the employees are allowed, *see, e.g.*, Nat'l Master Freight Agreement, art. 8, sec. 6 (change of operations); *id.* art. 23 (separation of employment), section 301 preempts the claims of interference with contractual relations and interference with prospective advantage. *Cf. California Elec. Co. v. Briley*, 939 F.2d 790, 793 (9th Cir. 1991) (holding that § 301 preempts employer's claims against employees for interference with economic and contractual relationships because employees' duties to employer were defined by CBA).

[9] We do not find *Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989), which MEA cites, instructive here. In *Dougherty*, a union employee's claim of tortious interference with contract arose from an alleged request by a client of the employer that the employee be terminated in retaliation for filing a safety violation complaint against the client. *Id.* at 767. In holding that the claim of tortious interference with contract was not preempted by section 301, however, the Sixth Circuit relied heavily on its interpretation of Ohio tort law. *Id.* at 770. Furthermore, unlike the Sixth Circuit, this court has generally found claims for interference with contractual relations and prospective economic advantage preempted by section 301. *See, e.g., California Electric*, 939 F.2d at 793; *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 827 F.2d 589, 591-92 (9th Cir. 1987); *Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1400-01 (9th Cir. 1985). Accordingly, we find MEA's claims of interference with contractual relations and prospective economic advantage preempted by section 301 and affirm the district court's dismissal of these claims.

D. *Intentional Infliction of Emotional Distress*

Finally, MEA alleges that the conduct of Milne and the other defendants caused the employees severe emotional distress. Under California law, a plaintiff must prove the following elements to establish intentional infliction of emotional distress: 1) outrageous conduct by the defendant, 2) intentional conduct or reckless disregard of the probability of causing emotional distress, 3) the plaintiff's suffering severe or extreme emotional distress, and 4) causation of the emotional distress by the outrageous conduct. *Galvez v. Kuhn*, 933 F.2d 773, 779 (9th Cir. 1991) (quoting *Trerice v. Blue Cross of California*, 209 Cal. App. 3d 878, 883, 257 Cal. Rptr. 338, 340 (1989)). "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1150 (9th Cir. 1988) (citing *Cervantes v. J.C. Penney Co.*, 24 Cal. 3d 579, 593, 595 P.2d 975, 56 Cal. Rptr. 198 (1979)).

[10] Claims for intentional infliction of emotional distress are frequently preempted by section 301. *See e.g., Cook v. Lindsay Olive Growers*, 911 F.2d 233, 239-40 (9th Cir. 1990); *Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400, 403 (9th Cir.), *cert. denied*, 111 S.Ct. 102 (1990); *Hyles v. Mensing*, 849 F.2d 1213, 1216-17 (9th Cir. 1988). Yet we have recognized that if a claim for intentional infliction of emotional distress arises from conduct not addressed by a collective bargaining agreement, such a claim may not necessarily be preempted. *See e.g., Galvez*, 933 F.2d at 779-80 (emotional distress claim arising from assault and battery by supervisor not preempted); *Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 536, 539 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987) (emotional distress claim arising from defamatory circulation of suspension letters not preempted). *See also Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1369 n.4 (9th Cir. 1984) (suggesting that an emotional distress claim arising out of a non-preempted claim does not provide a basis for federal jurisdiction), *cert. denied*, 471 U.S. 1099 (1985).

In the instant case, MEA's complaint appears to allege emotional distress arising from two types of conduct: 1) defendants' conduct in "terminat[ing] the employment relationship between Milne and its employees, and forc[ing] Plaintiffs to look for other jobs while experiencing the economic pressure, psychological pains and loss of self-esteem of unemployed persons," and 2) defendants' alleged malicious conduct designed to "sap the will of and psychologically weaken and . . . discourage Plaintiffs from pursuing their legal claims and remedies against Defendants." Insofar as MEA's emotional distress claim against the defendants arises from the employees' discharge or termination, resolution of the claim will require interpretation of the collective bargaining agreement. Because the CBAs address layoffs, their terms may be relevant to the issue of outrageous conduct by showing whether the type of termination involved here is permitted and, thus, is arguably reasonable. *See Galvez,* 933 F.2d at 779 (quoting *Miller v. AT & T Network Systems,* 850 F.2d 543, 550 (9th Cir. 1988)).

[11] Like the collective bargaining agreements at issue in *Tellez* and *Galvez,* however, no provision in the collective bargaining agreements before us defines standards for the second type of underlying conduct of which MEA complains: false representations to employees outside the collective bargaining process regarding continued company operation or liquidation of the company. *See Miller,* 850 F.2d at 550 n.5 ("[I]f the particular CBA does not govern the offending behavior, as in *Tellez,* then an emotional distress claim is not preempted."). Thus, to the extent that plaintiffs' emotional distress claim arises from defendants' alleged fraud and suppression of facts, no interpretation of the CBA or its terms will be necessary. *Cf. Perugini v. Safeway Stores, Inc.,* 935 F.2d 1083, 1088-89 (9th Cir. 1991) (emotional distress claim preempted to the extent it arises from employer's refusal to assign requested work but not preempted to the extent its arises from harassment due to pregnancy). Accordingly, MEA's emotional distress claim, insofar as it arises from defendants' alleged fraud, is not preempted by section 301.

III

Garmon Preemption

Because four of MEA's seven state law claims are not preempted by section 301, we turn to the defendants' contention that these claims are nonetheless preempted under *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959), and its progeny.

According to *Garmon,* when an activity is arguably prohibited or protected by sections 7 or 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et. seq.,* state and federal courts must defer to the exclusive jurisdiction of the National Labor Relations Board. *Id.* at 245. Conduct, however, that is arguably prohibited or protected by the NLRA will not be preempted under *Garmon* if the alleged conduct is only of peripheral concern to the Act or implicates interests that are "deeply rooted in local feeling and responsibility." *Id.* at 243-244 (citations omitted).

[12] In *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180 (1978), the Supreme Court refined the *Garmon* analysis and held that if the alleged conduct is arguably prohibited, the critical inquiry is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." *Id.* at 197 (finding no *Garmon* preemption of trespass action despite fact that union's picketing may have been arguably prohibited by the NLRA). It is only when the controversies are identical that "a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid." *Id.* at 197-98. The party claiming preemption bears the burden of demonstrating that the challenged activity is arguably prohibited by the NLRA. *International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 395 (1986).

A. *Bad faith bargaining*

Defendants contend that the alleged misrepresentations regarding Milne's continued operation and employees' job security are arguably prohibited by the NLRA as bad faith bargaining.

[13] An employer's decision to shut down part of its business for economic reasons is not a mandatory subject of bargaining under § 8(d) of the NLRA. *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 686 (1981). An employer, however, must bargain in good faith about the effects of a plant closure "in a meaningful manner and at a meaningful time." *Id.* at 682. The determination of whether an employer has provided such meaningful and timely notice depends upon the facts of each case. *Penntech Papers, Inc. v. NLRB,* 706 F.2d 18, 27 (1st Cir.), *cert. denied,* 464 U.S. 892 (1983). *Compare id.* (same day notice to unions of decision to terminate operations violated the duty to bargain over the effects of closure) *with Chippewa Motor Freight, Inc. & Action Carrier, Inc.,* 261 N.L.R.B. 455, 460 (1982)

(rejecting argument that two days' notice prior to terminal closure was not "a meaningful time" for the purpose of providing the union an opportunity to bargain about the effects of closure).

Generally, the duty to bargain in good faith is a continuing one. Bargaining about a plant closure's effects, however, is only required at a meaningful time because the prerequisite decision to close implicates unique concerns for management:

> [M]anagement may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.

First Nat'l Maintenance Corp., 452 U.S. at 682-83.

Here, the defendants allegedly misrepresented their plans for Milne's closure. They allegedly contrived new sales and service programs (MAC and CSM) in order to cover up their plan to liquidate Milne's assets. *See* Complaint, ¶ 18 and ¶ 19. Around June 1, 1987, they allegedly visited Milne terminals to " 'put[ ] to rest any rumors' that Milne was to be closed," and promised job security to the plaintiffs. *Id.* at ¶ 17. Two months later, they announced Milne's progress in making its debt payments, without revealing the alleged plan to close Milne or the uncertain status of the employees' job security. *Id.* at ¶ 20. MEA maintains that the employees were ignorant of Milne's financial woes until Milne's letter of September 8, 1987 announced that Milne would close absent concessions from the union. *See id.* at ¶ 23.

[14] We agree with the district court that these facts do not require the dismissal of the state law fraud and emotional distress claims under the *Garmon* doctrine. Most of the alleged misrepresentations involved Milne's impending closure, regarding which defendants had no duty to bargain. *First Nat'l Maintenance Corp.*,

452 U.S. at 686. Representations regarding Milne's sales programs or debt payments are also managerial decisions which are not subject to mandatory bargaining. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring). "An employer's failure or refusal to bargain over a nonmandatory subject does not violate section 8(a)(5)." *Wells v. General Motors Corp.*, 881 F.2d 166, 170 (5th Cir. 1989) (citing *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)), *cert. denied*, 110 S.Ct. 1959 (1990). Thus, to the extent that the plaintiffs' fraud and emotional distress claims are based upon such misrepresentations, they survive *Garmon* preemption.

Insofar as defendants also assured employees that their jobs would continue, several factors indicate that these statements also do not establish bad faith or fraudulent bargaining. First, these representations were an inevitable conclusion one could infer from the primary fraud alleged, namely, the deception of employees regarding Milne's continued operations. Thus, unlike an employer who falsely promises to relocate employees upon a plant's closure or who misrepresents the terms of severance pay, the instant facts appear to implicate management's prerogative to close rather than management's obligation to bargain about the effects of closure.

Second, given that the misrepresentations to individual employees regarding job security were made weeks and months prior to closure, defendants have not demonstrated that the Board would find that this arguably constituted a failure to engage in effects bargaining with the union at a meaningful time. *Cf. Creasey Co., Inc.*, 268 N.L.R.B. 1425, 1426 (1984) (four days notice to union of division closure was reasonable and did not violate employer's duty to bargain about effects). This is especially so in light of the fact that Milne subsequently revealed to the unions its plans to close absent concessions and also offered to bargain about the effects of closure. Indeed, in dismissing the unfair labor practice charges filed against Milne, the Board itself implied that Milne's notice to the Teamster bargaining agent in late August 1987 of the possibility of closure and its offer to bargain about the effects of closure in September 1987 satisfied Milne's duty to bargain in good faith. *See* S.E.R., Exhibit E.

Third, we are further convinced that Milne's assurances of job security did not constitute bad faith or fraudulent bargaining, because the alleged misrepresentations did not arise during collective or informal bargaining. While an employer may not be required to bargain about the effects of closure until "a meaningful time" is reached, if its raises the topic during bargaining in order to secure concessions regarding the terms and conditions of employment, any representations would have to be made in good faith. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1515-16 (11th Cir. 1988) (employer's securing of massive wage and benefit concessions by falsely representing that such concessions would keep the plant open constituted a failure to bargain in good faith), *cert. denied*, 490 U.S. 1066 (1989). Hence, it is relevant, though not dispositive, whether misrepresentations to union members arise during or outside of the collective bargaining process. *Wells*, 881 F.2d at 171.

The *Wells* court, for example, concluded that a fraud claim based upon an employer's misrepresentations outside of the collective bargaining process was not barred by *Garmon* preemption. In so holding, that court observed why such fraud had little import on national labor policy:

> [T]he challenged conduct here was not an attempt on the part of [the employer] to interfere with the collective bargaining process or to diminish the union's representative role; instead, it was a post-bargaining effort to induce individual employees to accept [voluntary termination] benefits. While not dispositive, it is relevant that the parties had completed collective bargaining over the [voluntary termination program]; GM's alleged inducements had no direct bearing upon the collective bargaining process in that they were not offered in order to obtain ratification of an agreement.

881 F.2d at 171 (footnotes omitted). *Cf. Windfield v. Groen Div., Dover Corp.*, 890 F.2d 764, 769-70 (5th Cir. 1989) (finding no *Garmon* preemption of fraud claim arising from employer's prom-

ise of job security to a union organizer employee).[7] Such reasoning applies with equal force here.

Here, MEA's complaint alleges that Milne officials made speeches or unilateral assurances promising that jobs would continue; nowhere does it assert that Milne lied during any kind of collective or informal bargaining for the purpose of inviting negotiations or obtaining concessions on the topic.[8] In contrast, cases finding a failure to bargain in good faith due to fraud regarding plant closures involve misrepresentations "concerning concessions sought, induced, or offered in order to avoid a plant closure."[9] *See, e.g., Parker,* 855 F.2d at 1515; *Kolentus v. Avco Corp.,* 798 F.2d 949, 960-62 (7th Cir. 1986) (finding *Garmon* preemption where employer allegedly misrepresented and failed to disclose facts relevant to plant closing during negotiation of a CBA and pension agreement), *cert. denied*, 479 U.S. 1032 (1987); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) (finding failure to bargain in good faith where employer obtained concession agreements by representing that plant would remain open and continued to exploit such negotiated concessions by fraud). Although the defendants' representations here may have been fraudulent, we are not persuaded that they constituted fraudulent or bad faith "bargaining." *Cf. Wells*, 881 F.2d at 171-72 (finding no *Garmon* preemption in part because employer's allegedly fraudulent representations were made independent of collective bargaining).[10]

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[7] *Contrast Wells,* 881 F.2d at 171-72 and *Windfield,* 890 F.2d at 769-70 *with Parker,* 855 F.2d at 1517-18 (finding *Garmon* preemption of fraud claims alleging that the employer obtained two concession agreements by fraudulently representing that it would keep its steel plants open).

[8] Defendants state that MEA's complaint, ¶ 23, alleges that Milne lied during the 1987 negotiations with the Teamsters by representing that concessions could prevent plant closure. That paragraph does not mention "lies" but alleges that Milne's letter of September 8, 1987 announced that Milne's operations would close down barring substantial concessions from the unions. It further alleges that "[t]his was the first time that Defendants ever communicated to Plaintiffs anything concerning their long-standing secret plans for Defendant Milne. At no time prior to the publication of that letter . . . did any of Defendants . . . apprise any of Plaintiffs of even the possibility that Defendant Milne . . . might be closed." Complaint, ¶ 23.

We construe the allegations of ¶ 23 as pointing out that the September 8 letter revealed for the first time defendants' plans to close Milne. Even assuming some ambiguity, we do not believe this contention by the defendants requires *Garmon* preemption of MEA's claims. *See Davis,* 476 U.S. at 395 (party claiming preemption must demonstrate that the challenged conduct is arguably prohibited by the NLRA).

[9] *Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co.,* 269 Cal. Rptr. 911, 914 (Cal. Ct. App. 1990) (describing *Parker, Serrano,* and *Kolentus*).

Even if we accepted defendants' argument that its alleged misrepresentations or concealment is arguably prohibited by § 8, we note that MEA's state law claims would not present an "identical" controversy to the one which could have been presented to the Board. *Sears*, 436 U.S. at 197-98. In determining whether defendants had failed to bargain in good faith, the Board would have examined issues such as whether Milne had given the unions meaningful notice of its decision to close, *see Penntech Papers*, 706 F.2d at 26-27, whether Milne had engaged in surface bargaining in its offer to bargain with the unions, or whether special circumstances influenced the timing of Milne's notice to the unions. *See Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983) (finding no breach of duty to bargain about effects despite trustee-in-bankruptcy's failure to provide pre-closure notification due to emergency situation), *cert. denied*, 465 U.S. 1023 (1984); *Penntech Papers*, 706 F.2d at 27. Resolution of the fraud and emotional distress claims, however, would focus upon different issues. The state court would inquire whether Milne made misrepresentations to the employees, whether the employees relied on such statements, whether the employees were damaged, and whether the employees suffered severe or extreme emotional distress from defendants' conduct. Hence, despite the commonality of some underlying facts, allowing the employees to pursue their state law claims will not interfere with the Board's determination of matters within its scope of expertise.

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[10] Even in *Serrano*, upon which the defendants rely, "the gravamen of the three fraud charges [was] that [the employer] did not bargain in good faith in obtaining concessions . . . in the July agreement." 790 F.2d at 1286. To the extent that the employer's post-negotiation misrepresentations in *Serrano* can be construed as an independent basis for finding a failure to bargain in good faith, rather than as a continued exploitation of the fraudulently-bargained concessions, we decline to follow our sister circuit.

Moreover, it is well established that some disputes arguably subject to *Garmon* preemption can be resolved by state law if the alleged conduct implicates interest "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 243-44 (citations omitted). California has a "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm." *Belknap, Inc. v. Hale*, 463 U.S. 491, 511 (1983). *See also Windfield*, 890 F.2d 764, 770 (5th Cir. 1989) (agreeing with *Belknap* that federal labor law should not "create an exemption from state law liability for misrepresentations or promises that are not specifically privileged as a matter of federal policy.").

We conclude that Milne's alleged misrepresentations to its employees are not arguably prohibited by the NLRA as bad faith bargaining and do not provide a basis for *Garmon* preemption.

B. *Direct Bargaining*

[15] Defendants next claim that Milne's misrepresentation constituted direct bargaining with employees, thereby providing another basis for *Garmon* preemption.

An employer who bargains directly with individual employees violates § 8(a)(5)'s requirement that an employer bargain collectively with the designated representative of its employees. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). In *Medo*, the Supreme Court found direct bargaining where the employer disregarded the employees' union by negotiating with individual employees after the employees offered to abandon the union for increased wages. As the Second Circuit explained, "[t]he vice that *Medo* sought to avoid was the practice of undermining the authority of the union's bargaining representatives through direct dealings with the locals or employees they represented. Such tactics are inherently divisive; they make negotiations difficult and uncertain; they subvert the cooperation necessary to sustain a responsible and meaningful union leadership." *NLRB v. General Electric Co.*, 418 F.2d 736, 755 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

[16] Here, the facts fail to reveal that Milne and the employees engaged in the type of conduct which generally leads to a finding of direct bargaining: namely, bargaining or negotiating over the terms of employment in circumvention of the designated representative. *See, e.g., Medo Photo Corp.*, 321 U.S. at 679; *NLRB v. Babad*, 785 F.2d 46, 50 (2d Cir.)(bargaining and settling the conditions of discharge with individual employees rather than union, *cert. denied*, 479 U.S. 830 (1986); *General Elec. Co.*, 418 F.2d at 755 (offering better terms to locals while bargaining with the unions' national bargaining representative). Instead, the alleged misrepresentation about continued job security occurred while Milne management made speeches or gave assurances that Milne would not close. In any event, even assuming that the alleged misrepresentations arguably constituted direct bargaining, the claims which would be presented to the state court and the direct bargaining charge which would be presented to the Board are not identical controversies.[11] *Sears*, 436 U.S. at 198. Accordingly, we affirm the district court's denial of defendant's motion for summary judgment on the basis of *Garmon* preemption.[12]

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[11] A direct bargaining or dealing charge would require the Board to examine whether the communications concerned terms and conditions of employment, whether the employer's communications to the employees were privileged under § 8(c) of the NLRA, and whether the proposals or communications tended to undermine or derogate the union's status as the exclusive bargaining representative. *See NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134-35 (2d Cir. 1986). These issues are different from those that would be presented to a state court resolving the fraud and emotional distress claims. *See supra* p. 5038 of opinion.

[12] In its petition for rehearing, defendants raise two arguments for the first time. They claim that *Garmon* preemption is required because their alleged misrepresentations constituted a direct promise of benefit in

CONCLUSION

We affirm the district court's holding that a nonsignatory to a collective bargaining agreement may remove a case to federal court on the basis of section 301 preemption. The district court properly exercised jurisdiction over MEA's claims for breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and interference with prospective economic advantage, as they were completely preempted under section 301. Accordingly, we affirm the district court's dismissal of these claims as time-barred.

The remaining claims of fraud, misrepresentation, and suppression of facts are not preempted under section 301 because their resolution does not require interpretation of the collective bargaining agreements. The claim of intentional infliction of emotional distress, insofar as it arises from defendants' fraud-related conduct, is not preempted under section 301 for the same reason. Moreover, these four claims are not preempted under the *Garmon* doctrine. We therefore remand these claims to the district court, which shall determine whether to retain pendent jurisdiction over these remaining state law claims or to remand them to state court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

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circumvention of the union or a unilateral change in the collective bargaining agreement. We have carefully considered these arguments and find them without merit.

No. 89-15837

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit
Corporation, or in the alternative Steven Bishop, Charles E.
Tharp, Debra Bishop and Ella Tharp, as representatives
of the class of affected former employees of
Milne Truck Lines, Inc., and their spouses,
Plaintiff-Appellant,

v.

SUN CARRIERS, INC.; ALBERT L. LABINGER; DONALD E.
MAYORAS; MILNE TRUCK LINES; ELLIOTT BURNSIDE;
CHARLES N. PASS; THOMAS MORTON; JAMES BRADFORD;
ST. JOHNSBURY TRUCKING; JONES TRUCK LINES; RIORDAN
FREEMAN & SPOGLI; RICHARD J. RIORDAN; BRADFORD M.
FREEMAN; RONALD P. SPOGLI,
Defendants-Appellees.

D.C. No. CV-88-4028-CAL

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
December 11, 1990 — Pasadena, California

Filed November 20, 1991
Amended May 4, 1992

Before: Alfred T. Goodwin, Otto R. Skopil, Jr., and
Robert Boochever, Circuit Judges.

Opinion by Judge Boochever

COUNSEL

Richard E. Schwartz, and James E. Parrot, Richard Schwartz & Associates, Ltd., St. Louis, Missouri, for the plaintiffs-appellants.

Charles G. Bakaly, Jr., O'Melveny & Meyers, New York, New York, for the defendants-appellees.

ORDER

The opinion in the above-entitled case filed November 20, 1991, slip op. 15323, is amended as follows:

Page 15328, line 4, delete "From that date until" and insert in its place "At some point between that date and"

Page 15328, line 12, after "made" insert "speeches"

Page 15328, line 14, add a comma after "Sun"; after "and" insert "asking them"

Section III of the opinion is amended to read as follows:

[set forth in Opinion, reprinted in Appendix at 1a-27a]

With these amendments, the panel judges have voted to deny the petition for rehearing and recommend rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Case No. C 88-4028 CAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MILNE EMPLOYEES ASSOCIATION, et al.,
Plaintiffs,
v.
SUN CARRIERS, INC., et al.,
Defendants.

ORDER AND JUDGMENT

Hearing Date: April 28, 1989
Hearing Time: 9:30 a.m.
Courtroom: 10

Based upon the matters placed before the Court by way of (1) defendants' Motion for Summary Judgment regarding the claims in this action brought by plaintiff Milne Employees Association ("MEA") on behalf of former unionized employees of defendant Milne Truck Lines, Inc. ("Milne") and their spouses and (2) plaintiff's Motion to Sever and Remand the claims brought by MEA on behalf of former non-union Milne employees and their spouses, the Court having duly considered all matters placed before it with regard to said Motions, it is hereby ORDERED that:

1. Defendants are entitled to summary judgment and dismissal with prejudice on all claims in this action brought by MEA on behalf of unionized former employees of Milne and on behalf of the spouses of those former unionized Milne employees on the ground that such claims, and all of them, are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"). The portion of defendants' summary judgment motion based on Section 301 preemption is therefore GRANTED.

2. Defendants are entitled to summary judgment and dismissal with prejudice on all claims in this action brought by MEA on behalf of unionized former employees of Milne and on behalf of the spouses of those former unionized Milne employees on the ground that such claims, and all of them, are barred by the six-month statute of limitations for claims arising under Section 301. The portion of defendants' summary judgment motion based on the six-month statute of limitations is therefore also GRANTED.

3. Defendants are not entitled to summary judgment and dismissal with prejudice on all claims in this action brought by MEA on behalf of unionized former employees of Milne and on behalf of the spouses of those former unionized Milne enployees on the ground that such claims are preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and its progeny. The portion of defendants' summary judgment motion based on *Garmon* preemption is therefore DENIED.

4. With regard to all of MEA's claims brought on behalf of former non-union Milne employees and spouses of those former non-union Milne employees, the plaintiff's Motion to Sever and Remand is GRANTED, and those claims are hereby REMANDED to the California Superior Court in and for the County of San Francisco.

5. Each side shall bear its own costs.

DATED: May 15, 1989

CHARLES A. LEGGE
Charles A. Legge
United States District Judge

No. C-88-4028-CAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MILNE EMPLOYEES ASSOCIATION, *et. al.*,
Plaintiffs,
v.
SUN CARRIERS, INC. *et. al.*
Defendants.

OPINION AND ORDER

Plaintiff has moved to remand this case to state court pursuant to 28 U.S.C. § 1447. The question presented is whether plaintiff's state law claims arise under § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a) and are thus removable.

I.

Plaintiff, Milne Employees Association ("MEA"), is a non-profit mutual benefit corporation which was formed for the purpose of conducting litigation on behalf approximately 800 former employees of defendant Milne Truck Lines ("Milne").[1] The identities of the individual claimants are, for the most part, not disclosed in the pleadings. But it is apparent from the face of the complaint that the assignees to MEA include both union and non-union workers, who were employed by Milne as truck drivers, dock and terminal personnel, clerical and other office personnel, maintenance employees, mechanics, supervisors, sales and marketing personnel and managers; and other lower and mid-level managers. Some but not all of the members of MEA were unionized employees in a collective bargaining unit and covered by collective bargaining agreements ("CBA").[2]

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[1] The court's analysis proceeds upon the assumption, drawn from the pleadings, that the former employees have individually assigned or will assign their claims to MEA for purposes of this litigation.

Plaintiff brought this action in state court against defendants Milne, its former parent company, Sun Carriers, Inc., two other trucking companies that were owned by Sun Carriers, the former owners of Sun Carriers, and several individuals who were directors or officers of Sun Carriers or Milne. The complaint alleges that on September 11, 1987, Milne was closed and its employees were terminated. All of plaintiff's claims appear to arise from and relate to the termination of Milne's trucking operations, resulting in the employees being laid off. Plaintiff avers that beginning in January 1987 and continuing until September 1987, when Milne announced that it was terminating operations, defendants intentionally and fraudulently misrepresented to Milne's employees that Milne would remain in operation and that the employees' jobs were secure. Plaintiff's complaint alleges various state law tort claims and specifically disavows any reliance on the collective bargaining agreements. MEA alleges that the defendants are liable in damages for fraud, misrepresentation, breach of the implied covenant of good faith and fair dealing, interference with both contractual relations and prospective economic advantage, intentional infliction of emotional distress, and loss of consortium claims. In addition, MEA seeks to impose a constructive trust on defendants.

Defendants removed the action to this court on the basis of federal question jurisdiction. Plaintiff now moves to remand.

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[2] Defendants assert that a "substantial majority" of the former employee claimants in this action were covered by the collective bargaining agreements between Milne and the International Brotherhood of Teamsters, Chauffeurs and Warehousemen, the Western Conference of Teamsters, and the International Association of Machinists ("IAM"), and more than 80 percent of Milne's workforce of approximately 1,600 employees at the time its operations terminated were unionized employees.

II.

MEA argues that because no federal question appears on the face of the complaint, removal was improper.

Title 28 U.S.C. § 1441 provides that a defendant may remove a civil action "brought in a State court of which the district court of the United States have original jurisdiction." The Supreme Court, in *Caterpillar v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 2429-30 (1987), recently reiterated the jurisdictional framework governing removal of federal question cases from state to federal courts:

> "Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."

Id. at 2429 (citations and footnotes omitted) (cited in *Hyles v. Mensing*, 849 F.2d 1213, 1215 (9th Cir. 1988)).

Ordinarily, a case may not be removed on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). However, under the complete preemption doctrine, once an area of state law has been completely preempted by federal law, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law. *Caterpillar*, 107 S.Ct. at 2428-2430; *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1146 (9th cir. 1988).

III.

As a threshold matter, plaintiff asserts that defendants did not have standing to remove this case based on the complete preemption doctrine, because the defendants other than Milne are not signatories to the collective bargaining agreements.

In *Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Committee*, 707 F.2d 1067 (9th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984), the Ninth Circuit addressed an analogous standing issue. In that case, the defendant argued that it was not a proper party to a § 301 claim because the defendant was not a party to the underlying collective bargaining agreement. In rejecting this argument, the court stated:

> "The fact that the Joint Committee is not a party to the agreement is immaterial. Section 301(a) does not contain any requirement that the parties to an action brought thereunder must also be parties to the allegedly breached contract .... All that is required for jurisdiction to be proper under Section 301(a) is that the suit be based on alleged breach of contract between an employer and a labor organization and that resolution must be focused upon and governed by the terms of the contract."

Id. at 1070-71. *Accord*: *Brown v. Keystone Consolidated Industries, Inc.*, 680 F.Supp. 1212, 1220-22 (N.D. Ill. 1988)(fact that plaintiffs cannot prevail on § 301 claim against a nonsignatory to a labor agreement for claims that are substantially dependent on the terms of the labor agreement does not empower the court to legislate an exception to its preemptive effect).

This court concludes that defendants had standing to *remove* plaintiff's complaint to federal court on the basis of the complete preemption doctrine. A contrary conclusion would permit plaintiffs to circumvent the preemptive effective of § 301 by simply naming individual directors or officers of the employer, rather than the employer itself, and would seriously undermine the Congressional intent behind § 301 that collective bargaining agreements be interpreted under a uniform body of federal labor law. *See Allis-Chalmers v. Lueck*, 471 U.S. 202, 209-12 (1985);

Smith v. Evening News Ass'n, 371 U.S. 195 (1962); *Teamsters v. Lucas Flour Co.*, 369 U.S. 103, 104 (1962).

IV.

Section 301(a) of the LMRA provides federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). A suit for breach of a collective bargaining agreement is governed exclusively by federal law under § 301. *Franchise Tax Board*, 463 U.S. at 23; *Newberry*, 854 F.2d at 1146. The preemptive force of § 301 is so encompassing that it also displaces entirely any state cause of action whose outcome depends on analysis of the terms of the agreement. *IBEW v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 2165 (1987); *Stallcop v. Kaiser Foundation Hosps.*, 820 F.2d 1044, 1048 (9th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 504 (1987). When "[t]he heart of the [state law] complaint [is] a . . . clause in the collective bargaining agreement," that complaint arises under federal law. *Caterpillar*, 107 S.Ct. at 2430, *citing Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 558 (1968).

Preemption of state law claims is not appropriate where state causes of action "confer[ ] nonnegotiable state-law rights on . . . employees independent of any right established by contract."[3] *Allis-Chalmers*, 471 U.S. at 213; *Utility Workers of America v. Southern Cal. Edison*, 852 F.2d 1083, 1085-86 (9th Cir. 1988); *Hyles*, 849 F.2d at 1216. Section 301 does not preempt every employment dispute tangentially involving the labor agreement. *Allis-Chalmers*, 471 U.S. at 211.

The most recent formulation of § 301 preemption test is set forth by the Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.*, — U.S. —, 108 S.Ct. 1877 (1988), where the Court held that "an application of state law is pre-empted by § 301 . . .

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[3] The Supreme Court recently stated, however, that "[i]t is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective bargaining agreement." *Lingle v. Norge Division of Magic Chef, Inc.*, — U.S. —, 108 S.Ct. 1877, 1882 n. 7 (1988).

only if such application requires the interpretation of a collective bargaining agreement." *Id.* at 1885.

It is unclear whether the *Lingle* decision defines a new test or merely amplifies the similar formulation set forth in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). In *Allis-Chalmers*, the Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citations omitted) (emphasis added). In *Newberry*, the Ninth Circuit analyzed the appellant's contentions under both tests "without indicating or suggesting that the tests do in fact differ." 854 F.2d at 1147. A distinction between the two tests, if any, is not relevant to the disposition of this motion. Therefore, the scope of § 301 preemption depends not on how the complaint is framed, but on whether the claims stated in the complaint can be resolved only by referring to the terms of the collective bargaining agreement. *Newberry*, 854 F.2d at 1146; *see also Ackerman v. Western Electric Co., Inc.*, 860 F.2d 1514, 1517 (9th Cir. 1988).

A.

MEA alleges that defendants intentionally misrepresented certain facts to Milne's employees, and fraudulently and negligently suppressed other facts, concerning the financial stability and future of Milne. Plaintiff's claims of misrepresentation, however, are inextricably intertwined with, and require interpretation of, the collective bargaining agreements.

In *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), the plaintiff argued that her state law tort claims for fraud and misrepresentation arose from oral representations made outside of, and independent of, the collective bargaining agreement. *Id.* at 1001. The Ninth Circuit, observing that any representations regarding the plaintiff's job security would, of necessity implicate the collective bargaining agreement, concluded that:

> "In order to show misrepresentation, Young would be required to show that the terms of the CBA differed signifi-

> cantly from the terms of the individual contract. As resolution of her misrepresentation claims would substantially depend on interpretation of the terms of the CBA, the claims are preempted."

Id.; see also Bale v. General Telephone Co. of California, 795 F.2d 775, 780 (9th Cir. 1986).

Similarly, here, plaintiff's claims center on representations allegedly made by defendants regarding plaintiff's job security, which require interpretation of the collective bargaining agreements in several respects. As in *Young* and *Bale*, to analyze those claims, this court will need to look at provisions of the agreements (e.g. the seniority, job security, layoff, notice, and plant closing clauses in those agreements) to determine whether those provisions differed from or supplemented the rights claimed by MEA.

Moreover, resolution of these claims would also require the court to interpret provisions in the Master Agreement which state that "[t]he employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement" and which further provide that "[a]ny such agreement shall be null and void." (National Master Freight Agreement, hereinafter "Master Agreement," p. 25, attached as Exhibit 2 to the removal petition). The collective bargaining agreements which governed employment at Milne expressly detailed the circumstances under which the employees could be laid off or discharged. (Master Agreement, pp. 39, 62; Western States Area Supplemental Agreements, hereinafter "Supplemental Agreement," Part II, p. 5, Part III, p. 6, Part IV, p. 3, Part V, p. 3, attached as Exhibit 3 to the removal petition; the International Association of Machinists Agreement, hereinafter "IAM Agreement," pp. 7-12, 24, attached as an exhibit to defendants' opposition to plaintiff's motion to remand). Those agreements also addressed the circumstances under which Milne could close all or part of its operations and the effect that such a total or partial closing would have on the rights of the bargaining unit employees. (Master Agreement, pp. 39-41).

Therefore, to prove the fraud and misrepresentation claims, MEA "would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made." *Bale*, 795 F.2d at 780.

Contrary to plaintiff's contention, *Caterpillar v. Williams*, 107 S.Ct. 2425, does not require a different result. In *Caterpillar*, the former employee plaintiffs were promoted to managerial positions outside the coverage of the collective bargaining agreement. Plaintiffs alleged that during the course of their employment, as managerial or weekly salaried employees, Caterpillar made oral and written representations. *Id.* at 2427. Subsequently, Caterpillar downgraded these employees to positions covered by the collective bargaining agreement. The Supreme Court held that the employees' claims for breach of individual contracts while managerial employees did not require interpretation or application of the collective bargaining agreement, and thus did not arise under federal law and were not removable to federal court. 107 S.Ct. at 2428-29. The fact that the challenged representations were made to plaintiffs while they were non-union employees, who were not covered by any collective bargaining agreeement, was central to the Supreme Court's determination that plaintiffs' claims were not dependent upon interpretation of the collective bargaining agreement. *Id.* at 2431.

Accordingly, plaintiff's claims for fraud and misrepresentation in this case, at least with respect to the unionized employees, arise under § 301.

B.

A plaintiff may not avoid the preemptive effect of § 301 by merely labelling the causes of action as such claims as breach of the implied covenant of good faith and fair dealing, interference with contractual relations or interference with prospective economic advantage. Such claims are still preempted if the underlying employment relationship is governed by a collective bargaining agreement. In *Allis-Chalmers*, the Supreme Court observed that "[s]ince nearly any alleged breach of contract can be restated as a tort claim for breach of good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims." 471 U.S. at 219. *See also Newberry*, 854 F.2d 1142 and *Scott v. Machinists Automotive Trade District Lodge 190*, 827 F.2d 589 (9th Cir. 1987).

Further, under California law, the tort of breach of the implied covenant of good faith and fair dealing is necessarily based on the existence of an underlying contractual relationship, and the essence of the tort is that a party to a contract cannot do anything that would deprive the other side of its rights with regard to that underlying contract. *See Seaman's Direct Buying Service v. Standard Oil Co.*, 36 Cal.3d 752, 206 Cal.Rptr. 354 (1984). This tort is designed to protect the job security of employees who at common law could be fired at will. *Newberry*, 854 F.2d at 1147; *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1373 n. 9, 1374-75 n. 11 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985). Generally, no comparable lack of job security exists for unionized employees protected by a collective bargaining agreement. *Newberry*, 854 F.2d at 1147; *Garibaldi*, 726 F.2d at 1374-75 n. 11.

Accordingly, the Ninth Circuit has consistently held that § 301 preempts the implied covenant when an employee has comparable job security under a collective bargaining agreement. *Newberry*, 854 F.2d at 1147; *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d at 999; *Scott v. Machinists Automotive Trades District Lodge 190*, 827 F.2d 589. In *Scott*, the court held that a unionized employee's claim for breach of the implied covenant clearly depends upon interpretation of the collective bargaining agreement." 827 F.2d at 591-92.

Here, these claims for breach of the alleged covenant made by the unionized members of MEA cannot, for purposes of federal jurisdiction, survive § 301 preemption. The state cause of action requires the interpretation of a collective bargaining agreement." *Lingle*, 108 S.Ct. at 1885. Plaintiff concedes, as it must, that the underlying contracts, with respect to the unionized employees, are the collective bargaining agreements. While plaintiff disavows any reliance on a collective bargaining agreement, it is clear that this claim will require the court to interpret certain provisions of the collective bargaining agreements.

C.

Similarly, federal courts have uniformly held that where the underlying contract is a collective bargaining agreement, claims for intentional interference with contractual relations and interference with prospective economic advantage must be recharacterized as claims arising under federal law. *See, e.g. Scott*, 827 F.2d 589 (9th Cir. 1987); *Evangelista v. Inlandboatsmen's Union of the Pacific*, 777 F.2d 1390 (9th Cir. 1985); *Brown v. Keystone Consolidated Industries, Inc.*, 680 F.Supp. 1212 (N.D. Ill. 1988); *Seid v. Pacific Bell, Inc.*, 635 F.Supp 906 (S.D. Cal. 1985).

Plaintiff alleges that the defendants other than Milne induced and caused defendant Milne to sever the employment relationship with the employees, and that all defendants interfered with the prospective advantages of the employees enjoyed in continued employment.

As with plaintiff's claims for breach of the implied covenant, these contract-based claims plainly require interpretation of the collective bargaining agreements. In determining whether defendants interfered with an employee's rights and prospective advantage under an employment contract, the court must construe the terms of the underlying contract itself. Accordingly, plaintiff's claims for interference with contractual relations and interference with prospective advantage, at least with respect to the unionized employees, arise under § 301.

D.

MEA also alleges that the conduct of defendants constitutes infliction of emotional distress. However, the Ninth Circuit has repeatedly held that where, as here, state law tort claims for emotional distress are based upon the same conduct as fraud or contract-based claims, which are substantially dependent upon interpretation of a collective bargaining agreement, emotional distress claims must also be construed as arising under § 301. *See e.g. Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142;

Miller v. A T & T Network Sys., 850 F.2d 543 (9th Cir. 1988); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 992.

For example, in *Newberry*, the plaintiff was fired for alleged misappropriation of track funds, and she brought state law claims for breach of the implied covenant of good faith and fair dealing and for intentional infliction of emotional distress. *Newberry*, 854 F.2d at 1144-45. Initially, the court concluded that plaintiff's claims for breach of the implied covenant arose under § 301, and then it found that plaintiff's emotional distress claim likewise arose under § 301. *Id.* at 1149-50. The court reasoned that the emotional distress claim arose from the same allegedly unlawful conduct as the contract-based claim, and therefore, a determination of the validity of the claim also requires the court to decide whether her discharge was justified under the terms of the collective bargaining agreement. *Id.; Accord: Hyles v. Mensing.* 849 F.2d 1213 and *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993.

Plaintiff relies on *Tellez v. Pacific Gas & Electric Co.*, 817 F.2d 536 (9th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 251 (1987), and *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) in support of its argument that the claims for intentional infliction of emotional distress do not arise under § 301. Its reliance, however, is misplaced. In both *Tellez* and *Garibaldi*, the Ninth Circuit determined that the claims were not tied to other claims which arose under § 301, and that the emotional distress claims did not otherwise require resort to any collective bargaining agreement. *Tellez*, 817 F.2d at 539-40; *Garibaldi*, 726 F.2d at 1371-75. Conversely, in this case, plaintiff's emotional distress claims are based on the same alleged conduct by defendants which forms the basis of their fraud and contract-based claims. (Complaint ¶¶ 61-66). Moreover, plaintiff's emotional distress claims cannot be resolved without resort to the collective bargaining agreements which covered Milne's unionized employees, because this claim addresses job security and layoff issues — issues that are addressed in those collective bargaining agreements. Accordingly, plaintiff's claims for emotional distress, at least with respect to the unionized employees, arise under § 301.

E.

Finally, on behalf of the spouses of certain discharged employees, MEA asserts a claim for loss of consortium. Under California law, however, a claim for loss of consortium is a derivative claim which cannot stand alone. *See Brittel v. Young*, 90 Cal.App.3d 400, 407 n. 5, 153 Cal.Rptr. 387, 391, n. 5 (1979) (unless a valid underlying claim is stated, a plaintiff cannot state a cause of action for loss of consortium).

Plaintiff admits that the claims for loss of consortium derive from the same conduct which forms the basis of the unionized employees' purported state law claims. (Complaint ¶ 72). Because those latter claims are grounded on rights created by a collective bargaining agreement, or dependent upon interpretation of a collective bargaining agreement, the derivative loss of consortium claims are also substantially dependent upon interpretation of the collective bargaining agreements which covered Milne's employees. *See e.g. Ward v. Savannah Maritime Ass'n*, 1988 U.S. Dist. LEXIS 5575 (S.D. Ga. May 23, 1988); *Cavins v. Aetna Life Insurance Co.*, 609 F.Supp. 309 (E.D. Wis. 1985). Accordingly, these claims for loss of consortium also arise under federal law.

V.

Finally, the question remains whether the claims of the non-union employees also arise under federal law. The question is complicated here by the fact that plaintiff is a corporation, acting as assignee of the claims of both union and non-union employees. In *Caterpillar v. Williams*, the Supreme Court held that individual employment contracts of employees not covered by a collective bargaining agreement do not require the interpretation or application of a collective bargaining agreement. 107 S.Ct. at 2431. The Supreme Court in *Lingle*, however, suggests that, under certain facts, the claims of non-union employees may require collective bargaining interpretation. 108 S.Ct. at 1882

n. 7. The Court states: "Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is nonnegotiable and applies to unionized and nonunionized workers alike. While it may be true that most state laws that are not pre-empted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures non pre-emption . . . . [I]f a law applied to all state workers but required, at least in certain instances, collective-bargaining-agreement interpretation, the application of the law in those instances would be preempted." *Id.* This court cannot resolve the issue of jurisdiction over the non-union claims on the present record.

Options available to the court to resolve the issue include: (1) permitting plaintiff to sever off the claims of the non-union employees and remanding them to state court; (2) exercising pendent jurisdiction over the non-union claims; or (3) stay its decision on the non-union claims pending further development of a factual record.

The court concludes and orders that:

(1) The claims of the union employees are preempted, and therefore plaintiff's motion to remand is DENIED, without prejudice to renewing the motion as to the claims of the non-union employees;

(2) The parties may take discovery and file whatever motions or briefs they believe are appropriate on the issue of the claims of the non-union employees; and

(3) The parties shall attend a status conference on March 10, 1989 at 11:00 a.m.

IT IS SO ORDERED.

January 31, 1989.

CHARLES A. LEGGE

CHARLES A. LEGGE
United States District Judge

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AUG 17 1992
OFFICE OF THE CLERK

No. 92-65

In The

Supreme Court of the United States

◆

October Term, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER; DONALD E. MAYORAS; MILNE TRUCK LINES; ELLIOTT BURNSIDE; CHARLES N. PASS; THOMAS MORTON; JAMES BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK LINES; RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN; BRADFORD M. FREEMAN; RONALD P. SPOGLI,

Petitioners,

vs.

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit Corporation, or in the alternative STEVEN BISHOP, CHARLES E. THARP, DEBRA BISHOP and ELLA THARP, as representatives of the class of affected former employees of MILNE TRUCK LINES, INC., and their spouses,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Should federal labor laws be interpreted to alter radically the constitutional balance enshrined in the concepts of federalism by supplanting any and all state law regulation of matters peripheral to the labor-management bargaining relationship — such as laws providing causes of action for fraudulent misrepresentations and concealments arising outside of any collective bargaining?

II. Can an employer properly conduct a successful defense before the NLRB against unfair labor practice charges and later claim *Garmon* preemption against a state-law suit arising from the same factual setting as that which gave rise to the NLRB complaint?

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STATEMENT OF THE CASE

Respondents present this Statement of the Case for the purpose of correcting petitioners' mischaracterization of their case and the allegations appearing in their state-law complaint.

Respondents are Milne Employees Association (herein "MEA") and, alternatively its officers and directors as proposed class representatives. MEA was formed for the purpose of conducting this litigation on behalf of its members, 614 former employees of petitioner Milne Truck Lines, Inc. ("Milne" or "Milne Truck" hereinafter) and 480 spouses of those employees who assert claims for spousal injury or loss of consortium. Forty-eight of the former employees were in managerial or other nonunion positions not covered by a collective bargaining agreement ("CBA" herein) (App. 2a-3a). MEA originally filed its claims in the California Superior Court. Defendants removed the case to federal court claiming complete immunity from suit under federal labor law preemption (App. 4a).

This writ proceeding involves only the state-law tort claims of the former union employees (and their spouses) of petitioner Milne. The claims of the nonunion former employees of petitioner Milne were severed by the district court, remanded to state court (App. 4a) and there are proceeding.

Milne Truck is the only petitioner which signed or was covered by any CBA with the unions representing members of MEA. In the 50 years before 1980, Milne Truck was an independent trucking company operating in the Western United States (App. 3a). In 1980, petitioner Sun Carriers, Inc. ("Sun") acquired petitioner Milne in a leveraged buy-out, and Milne became a subsidiary of petitioner Sun (App. 3a). On September 29, 1986 all of the stock of petitioner Sun was sold to the officers of petitioner Sun and petitioners Riordan, Freeman, and Spogli. *Id.*

Respondents' well-pleaded complaint alleges that after the LBO and up until September 1987 all of the petitioners conspired in a secret plan to liquidate the assets of Milne Truck in order to assist Sun and the Riordan partnerships to pay down their massive debt assumed in the buy-out of Sun. *Id.*

Respondents complain that all petitioners engaged in a protracted campaign of deception and fraud to effectuate their secret plan to liquidate Milne Truck. The complaint asserts that in January 1987 Milne Truck began a massive reduction of its sales force which was falsely announced as a "refocus" of sales activities. *Id.* Such reductions produced widespread rumors in the trucking industry and throughout Milne Truck's workforce of its imminent closing. *Id.*

In response to those rumors, petitioners visited Milne Truck's various terminals in an effort to calm the workforce and to put such rumors to rest. *Id.* In those meetings,petitioners made and presented videotapes (shown to all members of MEA) promising job security, asking the respondents not to seek other work, and asking the respondents to have faith in the group controlling Sun Carriers. *Id.*

On August 1, 1987 Milne Truck announced the sale of its Wyoming terminal. In response to increased apprehensions by it employees, petitioners falsely claimed that sale was "only a revamping" of operations and that Milne Truck would continue there. On August 21, 1987 Milne Truck sold another terminal, again representing that its operations would continue as normal but "blended" with other Milne Truck terminals in Northern California. *Id.*

Finally petitioners revealed their hidden cards. In a letter dated September 8, 1987 Petitioners demanded that the Teamsters (which represented most MEA members) grant major concessions on wages and benefits. *Id.* Petitioners required that those concessions be agreed to within three days or all Milne Truck's operations would be closed. *Id.* On or about September 11, 1987, Petitioners completed their conspiracy of fraud and misrepresentation by closing down Milne Truck and liquidating its assets. *Id.*

On September 8, 1988 respondent MEA and the alternative representatives of the proposed class filed their complaint in the Superior Court of the State of California. They asserted seven state-law tort actions, including fraud by intentional misrepresentation of facts, fraud by suppression of facts, negligent misrepresentation of facts, and intentional infliction of emotional distress; respondents also sought the equitable remedy of imposition of constructive trust (App. 3a-4a).

The complaint specifically disclaimed any reliance on any portion of any CBA. No CBA even addressed the eventuality of a total plant closure. The suggestions of petitioners that the CBAs "address the rights and duties attendant to plant closure" (Petition at 3) or that a CBA might be so interpreted (*id.*) are without factual foundation and contrary to the factual analysis engaged in by the Ninth Circuit. *See Milne Employees Ass'n v. Sun Carriers*, 960 F.2d 1401, 1409-10 (9th Cir. 1991).

On removal, the district court held all claims by the union employees preempted by § 301 of the Labor Management Relations Act, (LMRA), 29 U.S.C. § 185. The district court denied the § 301 preemption claim as to the non-union employees' state-law causes. The district court denied, as to all employees, petitioners' claim that the *Garmon* doctrine preempted the state-law causes. *See MEA v. Sun Carriers*, 714 F. Supp. 1028 (N.D. Cal. 1989).

The Ninth Circuit reversed the § 301 preemption rulings on the union employees' claims for fraud and intentional infliction of emotional distress; it remanded these claims to the district court for a determination whether remand to state court was required. *Milne Employees Ass'n v. Sun Carriers*, 960 F.2d at 1418. The Circuit upheld the district court's rulings in all other respects. *Id.* Specifically, the appeals court found after additional requested briefing that the claims for fraud and intentional infliction of emotional distress ***arising out of the fraudulent conduct*** were not preempted by the *Garmon* doctrine. *Id.* Contrary to petitioners' contention (Petition at 7)respondents have abandoned on appeal neither their spousal claims nor their request for imposition of a constructive trust. *Milne Employees Ass'n*, 960 F.2d at 1405, n.3. Rather, those purely derivative claims were not germane to the appeal.

One particular distortion merits special mention. Petitioners claim that Milne Truck's operations "lost several million dollars" after their leveraged buy-out (Petition at 6). This is unsupported in the record; petitioners first alleged such losses only after respondents filed their complaint. This ***concealment*** of heavy losses — if indeed such occurred — lies at the heart of respondents' complaint (App. 3a).

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT CORRECTLY APPLIED THE § 301 PREEMPTION ANALYSIS REQUIRED BY PRECEDENTS OF THE COURT IN REFUSING TO FIND PREEMPTED FOUR OF RESPONDENTS' CAUSES OF ACTION.

The Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S.

399 (1988) enunciated a clear, bright-line test for resolution of federal labor law defenses based upon alleged preemption under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). "To determine whether a state law claim is completely preempted under section 301, the relevant inquiry is whether resolution of the claim requires interpretation of a collective bargaining agreement." *See Milne Employees Ass'n*, 960 F.2d at 1408. This correctly reflects the test enunciated by this Court in *Lingle, supra*, and is a faithful expression of the congressional intent in enacting this statute. The legislative history of the Taft-Hartley Act leaves unmistakable the inference that Congress never intended to supplant all state regulation in the labor field done under the exercise of the states' police powers. *See* H. R. Rep. No. 245, 80th Cong., 1st Sess. for the report of Congressman Hartley ("makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other. . . ."). *Accord* S. Rep. No. 105, 80th Cong., 1st Sess. at 15-17 (1947) (Sen. Taft), *cited in Dowd Box Co. v. Courtney*, 368 U.S. 502, 511-13 (1962).

Beyond creating a federal jurisdictional vehicle for suing unions in federal court for CBA breaches, the Court has identified two other intents of the Congress in enacting § 301. The second intent was to promote collective bargaining that ends with agreements not to strike by authorizing federal courts to fashion a body of federal law for enforcement of CBAs. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451, 454-55 (1957). The third congressional intent discerned in the jurisprudence of this Court was to promote uniformity of interpretation and to avoid unpredictability in the interpretation of phrases and clauses in CBAs. *Teamsters v. Lucas Flour*, 369 U.S. 95, 102-04 (1962). None of these legislative purposes is implicated or affected to the slightest degree by allowing California and other states to regulate frauds and deceits practiced by employers upon unionized employees. Respondents recognize that other federal labor law principles may preempt state law even though § 301 preemption is not applicable. *See Lingle*, 486 U.S. at 408 and n.8. Petitioners make no claim of *Machinists* preemption or of ERISA preemption. Their contentions regarding *Garmon* preemption were the subject of lengthy and careful analysis by the Ninth Circuit. Respondents address same at III, *infra*.

While this Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), found preemption of a contract-based state-law tort (bad faith handling of an insurance claim), the Court has been careful in its jurisprudence to limit the scope of *Lueck* to that necessary to promote the interests of "interpretative uniformity and predictability". *Id.* at 210-11. Congress has never exercised its authority to occupy the entire field of labor legislation. *Id.* at 208-09. The *Lueck* Court carefully bore in mind that the courts are cautioned not to extend the preemptive effect of 301 beyond suits for breach of contract because any such extension would be inconsistent with the congressional intent. *Id.* at 212. It is instructive that the Court found preemption in *Lueck*, not because it was a "bad-faith" tort, but rather because the right underlying that remedy and the duty whose breach gave rise to the state-law claim existed only by implication from the express terms of the union contract. *Id.* at 213-218.

What the Ninth Circuit has done here was to follow the dictates of *Lueck* and *Lingle* by engaging in a careful analysis of each element of each of the four state-law causes of action which it found not preempted. *Milne Employees*, 960 F.2d at 1407-10. The Ninth Circuit concluded:

> In sum, none of the elements of the fraud, misrepresentation, or suppression claims requires interpretation of the collective bargaining agreements.

Id. at 1409. Contrary to the misconceived argument of petitioners (Petition at 13) the duty to disclose which underlies Count II of respondents' complaint has its source entirely in California state law, not in any of the CBAs between Milne Truck and its unions. *Milne Employees*, 960 F.2d at 1408 (citing to California jurisprudence). Respondents request that the Court note that the Ninth Circuit found that 301 preempted their claims for intentional infliction of emotional distress, except insofar as those claims were based upon fraud and suppression of facts. *Id.* at 1412-13.

In performing the element-by-element analysis of Respondents' seven pleaded tort claims, the Ninth Circuit exercised scrupulous care to preempt all claims for which any element even arguably was not completely "independent" of the CBAs. *Lingle*, 486 U.S. at 410, n. 10.

As a matter of fact, petitioners were given the benefit of every doubt by the Ninth Circuit concerning whether any element of respondents' claims might not have been truly "independent" within the meaning of *Lingle*. As in *Lingle*, each element of all of the state-law tort actions held not preempted presented "purely factual questions" which pertained to the conduct of the employee and the conduct and motivation of the employer. None of the elements of the California substantive law presented by these four causes of action requires a court to interpret any term of a CBA.

> Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.

Lingle, 486 U.S. at 407.

Respondents note that the Court in *Lingle* held that "parallelism" in state-law analysis did not render the state-law dependent upon the CBA. Nevertheless the Ninth Circuit held that all three of Respondents' California tort claims which the Circuit Court characterized as "contract-based" were preempted by § 301. *Milne Employees*, 960 F.2d at 1410-12. Respondents would submit that in these aspects the Ninth Circuit opinion gave undue deference to its own precedents and to certain fragments of the literal language of *Lueck* by finding preempted the claims for interference with contractual relations, interference with prospective economic advantage, intentional infliction of emotional distress by the terminations, and breach of the implied covenant of good faith and fair dealing. The Circuit Court likewise did not give full application to the bright-line test of *Lingle* in finding that respondents' claims for intentional infliction of emotional distress were preempted insofar as they were based upon termination of the employment relationships. *Id.* at 1412-13. Intellectually rigorous application of the *Lingle* test for preemption would have required a contrary result as to these latter claims. But they turn principally upon precise definitions of California state-law elements. Since the decision of the California Supreme Court in *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988), at least one of these preempted causes of action has been rendered moot as to MEA's unionized members. Therefore the Ninth Circuit's decision presents no special and important reasons for granting the Petition for Writ of Certiorari. Nothing has occurred in the Ninth Circuit's handling of this cause which calls for an exercise of this Court's power of supervision. *See* S .Ct. R. 10.1.

The questions of federal law about which petitioners purport to raise good-faith questions have been fully settled by recent decisions of the Court. Given what the Ninth Circuit referred to as "the unique facts alleged in this case", *Milne Employees*, 960 F.2d at 1410, there is no reason for the Court to revisit its recent decisions under § 301 of the LMRA.

II.

THE DECISION BELOW PRESENTS NO ISSUE OF NATIONAL IMPORTANCE.

The Ninth Circuit decision here decides no question of federal law which has not been already settled by this Court. The portions of the decision below which petitioners cite as grounds for issuance of a writ of certiorari do not conflict with any applicable decision of this Court. Thus it is difficult to comprehend the true intention underlying petitioners' second argument. *See* S. Ct. R. 10.1(c). Respondents have no quarrel with the policies embodied in such decisions as *Lucas Flour, Lincoln Mills,* or *Dowd Box Co.* Respondents do, however, take strenuous exception to the actions of petitioners in attempting to blur the distinction between the older line of § 301 cases, which dealt with uniformity of interpretation of CBAs and their enforcement, and the Court's later cases which guided the Ninth Circuit. Petitioners would blithely disregard the clear policy of this Court expressed in such decisions as *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987), *Lueck* and *Lingle* that unionized employees are not to be deprived of their independent state-law rights merely because they happen to work under a CBA. In finding free from § 301 preemption certain of respondents' tort claims, the Ninth Circuit has done nothing of national importance. To the contrary, it has demonstrated its fidelity to the principle of § 301 preemption developed in *Lucas Flour, Lueck,* and *Lingle*. State laws whose application might lead to inconsistent results are preempted because of the necessity for national uniform interpretation and application of federal labor law principles. *Lingle,* 486 U.S. at 406.

Here the Ninth Circuit determined that all of the elements of the tort claims on which it has permitted respondents to go forward present purely factual questions relating to conduct and motivation which require no interpretation of any term of a CBA. *Id.* at 407.

Petitioners imply that somehow the respondents' claims could have been the subject of grievance and arbitration. The record is devoid of any substance for that claim. But, even if petitioners' conduct toward respondents had been arbitrable, *i.e.*, assuming *arguendo* that some hypothetical clause of the CBAs might have implicated the same analysis of the facts as would an inquiry under petitioners' fraud claims, the California tort claims would still be "independent" for § 301 preemption purposes since they can be resolved without interpreting any CBA. *Id.* at 408-10. It is doubtful at best whether a union could contract to waive its members independent state-law rights when they are of such fundamental importance as those embodied in Cal. Civ. Code §§ 1708, *et seq*. It is abundantly clear that there is no evidence of any such waiver in this case. Respondents note that the plaintiff in *Lingle* enjoyed explicit rights under the CBA signed by her union which closely paralleled her right under Illinois tort law which this Court found not to be preempted. 486 U.S. at 401, 407-10.

Petitioners' repeated invocation of *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) is somewhat mystifying in this context. *Republic Steel* dealt with the application of state law to collect severance pay provided for under a CBA. The Ninth Circuit in applying the proper § 301 analysis to find these fraud claims not preempted has done nothing to "sidestep" any CBA. Nor have respondents. Petitioners' claim here that a writ of certiorari should issue implicitly rests on their studied avoidance of the truly "independent" nature of the state-law rights which the Circuit Court has ruled respondents may seek to vindicate in court.

Under the rulings of the Court it would appear that respondents are entitled to a presumption against permitting § 301 to preempt the State of California's police power regulations expressed in §§ 1708-1711 of its Civil Code. *See Cipollone v. Liggett Group Inc.*, 112 S. Ct. 2608, 2617-18, 2620-21 (1992). Petitioners can show no evidence at all, much less clear and unambiguous evidence that Congress intended the California common-law damages actions at issue here to be preempted by § 301. Indeed, only by resort to the principles of implied preemption have the prior decisions of the Court found a congressional intent in § 301 to preempt this field even partially. 112 S. Ct. at 2625-26, 2629 (concurring opinion of Justice Blackmun). While the precise contours of this presumption remain to be defined precisely, and its existence subject to some debate, *Id.* at 2632-34 (dissenting opinion of Justice Scalia), it would appear beyond question that respondents are entitled to the benefit of such a presumption in light of the specific language of § 301 which completely lacks any express preemption language. *Id.* at 2624.

In their labors to contrive preemption where the precedents of this Court permit none, Petitioners have lost sight of the "interstitial" nature of federal labor law. *See Metropolitan Life Ins. Co. v. Mass*, 471 U.S. 724, 756 (1985). The independent rights on which respondents have sued have existed in California since 1872; there can be no reasonable doubt that the regulation of deceit and fraudulent conduct is deeply rooted in local tradition. The positions urged upon the Court by petitioners call to mind the philosophy expressed by the Court regarding interpretation of federal labor laws:

> It would *turn the policy* that animated the Wagner Act *on its head* to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Id. (emphasis supplied). It is apparent that petitioners' true motive in seeking the Writ of Certiorari is to persuade the Court to effect a major re-working of federal labor law. Their contentions, in reality, are aimed not at the Ninth Circuit opinion here, but rather at numerous precedents of this Court and the Circuit Court's application of those cases, especially *Lingle*.

III.

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS' STATE-LAW CLAIMS FOR FRAUDULENT CONDUCT INCLUDING EMOTIONAL DISTRESS DAMAGES WERE NOT PREEMPTED UNDER THE *GARMON* DOCTRINE BECAUSE THOSE CLAIMS AROSE OUT OF CONDUCT OUTSIDE OF COLLECTIVE BARGAINING IS CONSISTENT WITH THE COURT'S JURISPRUDENCE AND RULINGS OF THE OTHER CIRCUITS.

Both the district court and the Ninth Circuit, on original appeal and after additional briefing, rejected the same arguments repeated by petitioners to this Court on the question whether respondents' state-law claims are preempted under the doctrine of *San Diego Bldg Trades Council v. Garmon*, 359 U.S. 236 (1959).

As a preliminary matter, respondents note that, although petitioners assert the Ninth Circuit's decision conflicts with precedents of this Court, petitioners fail to point out even one departure from the Court's *Garmon* rulings. Indeed, the Ninth Circuit's decision rejecting *Garmon* preemption effortlessly flows from the progeny of *Garmon* in this Court. *See*, for example, *Belknap Inc. v. Hale*, 463 U.S. 491 (1983) (holding a state-law fraud claim not preempted by Garmon); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (rejecting *Garmon* preemption of a claim for intentional infliction of emotional distress under California law); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (holding *Garmon* did not preempt a state-law trespass claim against a union); and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (rejecting a claim of *Garmon* preemption against a state-law defamation claim alleging false statements).

There is no conflict between the Circuits as to application of the *Garmon* doctrine to state-law fraud. The cases endlessly cited by Petitioners from various Circuits are clearly distinguishable on their salient facts from the state-law claims asserted by respondents. All respondents' claims involve conduct occurring outside of any collective bargaining. The Ninth Circuit and the district court correctly rejected the "direct-bargaining" and other inapposite cases cited by petitioners.

It is critical one remain cognizant that the Ninth Circuit's ruling here on *Garmon* preemption sets forth no new, bright-line test or rule to be employed in every fraud case. Rather, the opinion below is a proper application of this Court's *Garmon* jurisprudence to this unique factual scenario. This decision of the Ninth Circuit is easily reconciled with *Garmon* rulings from the other Circuits.

A. The NLRB Specifically Rejected Unfair Labor Practice Charges By The Representative Unions Before The State-Law Complaint Was Filed. Therefore The State Court May Exercise Jurisdiction Over The Conduct Alleged In The Complaint That Is Not Covered By Federal Labor Laws.

Garmon gave clear guidelines to resolve a preemption defense where the NLRB has heard charges and found no unfair labor practice. The Court held that, if the Board finds the conduct charged not to be prohibited by § 8(a) of the NLRA, 29 U.S.C. §§ 157-158, then the states may exercise jurisdiction over the employer's conduct. 359 U.S. 245-46. See also, id. at 253 (Justice Harlan concurring) ("Henceforth the States must withhold access to their courts until the [NLRB] has determined that such unprotected conduct is not an unfair labor practice. . .").

In *Garmon* the Court held the state-law claims preempted because the NLRB had not adjudicated the status of the union's conduct to determine whether the picketing was a protected, concerted activity. *Id.* at 246. Here, in contrast, the NLRB has spoken and found no unfair labor practice.

In late September and October 1987, three unions representing respondents filed separate unfair labor practice charges with the Board alleging Milne Truck failed to bargain ("bad faith" bargaining) about petitioners' intent to close operations and about Milne Truck's deadline proposal for wage and benefit reductions.

After investigation the NLRB Regional Director rejected allegations of unfair labor practices because of insufficient evidence Milne Truck had repudiated its CBA or engaged in unlawful direct bargaining with its employees. Put another way, the Board has already found that petitioners "satisfied" their "duty" under the federal labor laws "to bargain in good faith" about the closure of its operations. *See Milne Employees*, 960 F.2d at 1415.

California therefore is not precluded from adjudicating violations of Petitioners' duties arising solely under its law, where those duties do not present a controversy identical to that ruled by the NLRB. Matters not identical to those ruled by the Labor Board (and thus not "arguably" unfair labor practices) are subject to state-law regulation. *Belknap v. Hale*, 463 U.S. at 510. California's anti-fraud statutory scheme, in existence long before the federal labor laws, is a permissible regulation of fraudulent conduct occurring outside any collective bargaining. *See* Cal. Civ. Code §§1708, *et seq.*

B. These State-Law Claims Are Not Identical To The Unfair Labor Practice Charges Presented To The NLRB. Hence Respondents' State-Law Claims Arising From Conduct Outside Collective Bargaining Are Not Preempted By *Garmon.*

Garmon preemption exists to protect the primary jurisdiction of the NLRB to determine in the first instance what conduct is prohibited or protected by the NLRA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 213 n.9. Thus, The "critical inquiry in applying the *Garmon* rules...is whether the controversy presented to the state court is *identical* with that which could be presented to the Board". *Belknap, Inc. v. Hale*, 463 U.S. at 510 (emphasis added), *citing Sears, Roebuck*, 436 U.S. at 197. If the controversy presented to the state court is *different* from that which was presented to the Board, the state-law claim is not preempted under *Garmon. Id.*

There need be only subtle differences between the causes of action presented to the state court and the charges before the NLRB to avoid *Garmon* preemption. The Court in *Sears, Roebuck* noted: "Although the arguable federal violation and the state tort *arose* in the *same factual setting*, the respective controversies presented to the state and federal forums would not have been the same". 436 U.S. at 196-97 (emphasis added). Respondents direct the Court's attention to its careful delineations between the state-law claims and unfair labor practice charges set forth in *Sears Roebuck*, 436 U.S. at 197-98, *Farmer*, 430 U.S. at 305, and *Linn*, 383 U.S. at 61-63.

Here, the NLRB was presented with an entirely different controversy for *Garmon* purposes than MEA alleged in its state complaint. The charges to the Board alleged unfair labor practices in the refusal of Milne Truck to bargain about its decision to close all its 33 terminals unless its proposal for immediate wage and benefit concessions was accepted. In short, the issue before the

Board was whether Milne's actions were indicative of an anti-union animus.

By contrast, respondents' complaint principally alleges violations of California statutory law of general applicability proscribing fraud and deceit. It directly implicates California interests in protecting its citizens from fraud. The factual issue to be decided in MEA's state suit is whether petitioners made oral, written and video misrepresentations of job security to quell the rumors of imminent plant closing and to prevent a mass exodus of employees (through false inducements or suppression) when petitioners knew or had reason to know such were false. No collective bargaining about the plant closing was underway when petitioners' wrongful conduct occurred. MEA's suit does not question whether the defendants should have collectively bargained about their secret plan to close. The Ninth Circuit thus properly found that *Garmon* does not preempt here because the complaint raises issues not identical to the controversy the NLRB decided. *See Belknap*, 463 U.S. 510 (fraud claim not preempted by *Garmon*); *Windfield v. Groen Div.*, 890 F.2d 764, 770 (5th Cir. 1989) (fraud claim by a "union organizer" not preempted by *Garmon*); and *Wells v. General Motors Corp.*, 881 F.2d 166, 171 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (fraud claims not arising out of collective bargaining not preempted).

1. Petitioners Had No Duty Under Federal Labor Law To Bargain About The Decision To Close Their Operations So It Could Not Arguably Be An Unfair Labor Practice For Them To Fail To Bargain About Their Secret Plan To Close And Intentionally Deceive Respondents. But Such Fraudulent Conduct May Violate State Duties Existing Independently Of The Employer-Employee Relationship.

At 19-20 of their Petition, petitioners would now content they *arguably* committed an unfair labor practice by failing to bargain about their decisions to close Milne Truck and to conceal that decision from the employees through fraudulent misrepresentations. That claim fails to create *Garmon* preemption for two reasons.

First, the NLRB already rejected unfair labor practice charges arising out of the closure and petitioners' alleged failure to bargain about that decision. Second, employers have no duty to collectively bargain over a decision to close plant operations. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). *Ipso facto*, an employer does not have a duty to bargain about having misrepresented its decision to close down operations - *e.g.*, promising employees their jobs are secure and the business will not close. An employer's failure or refusal to bargain over a non-mandatory subject is not an unfair labor practice. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Thus, not even arguably could petitioners have committed an unfair labor practice by not bargaining about their misrepresentations of their decision to close. Nor could they have done so by not bargaining about their secret plan itself. It smacks of the crudest form of sophistry for petitioners to attempt to hide behind the labor laws to avoid claims for violations of independent state-law rights when their reprehensible conduct flaunted all legal norms.

This is not to say petitioners' conduct is immunized from sanction. The Ninth Circuit cogently set forth the applicable California statutory and common law proscribing petitioners' pattern of intentional, deceitful acts. *See Milne Employees*, 960 F.2d at 1408, 1412. That state law imposes independent duties on all persons generally.

2. *Respondents' State-Law Claims Do Not Implicate Direct Bargaining" With Employees, Nor Do They Involve Promises To Induce The Employees To Circumvent Their Representative Unions. Rather, These Fraudulent Misrepresentations Made To Dispel Rumors Of Closing Had No Relationship To Collective Bargaining.*

Petitioners claim at page 21 of the Petition that their misrepresentations to MEA members were unfair labor practices as "direct bargaining" with the plaintiff class. But the law is clear that not all employer communications to employees are impermissible direct bargaining.§ 8(c) of the NLRA permits an employer to communicate to employees "any views, argument, or opinion" so long as the "expression contains no threat of reprisal or force or promise of benefit", such as forcing the employees to reject the union as their representative or presenting them with a Hobson's choice for an anti-union motive. *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 133 (2d Cir. 1986).

An unfair labor practice arises only when the employer's communication "attempts to coerce the employees, or to portray the employer rather than the union as the workers' true protector...". *Id.* at 134. Thus, no "direct bargaining" occurs where the employer "never directly said - nor even implied that the workers would be better off without the union". *Id.* at 135.

No provision of the NLRA was intended by Congress to privilege an employer's voluntary misrepresentations to employees of job security that are tortious under state law. *See Belknap, Inc. v. Hale*, 463 U.S. at 512; *Windfield v. Groen Div.*, 890 F.2d at 770 (applying to a union employee's fraud case the *Belknap* holding that fraud claims are not preempted by *Garmon*).

Here respondents alleged no anti-union motive behind petitioners' intentional misrepresentations of future job security. Petitioners have come forward with no evidence of their intent to coerce the employees to abandon the unions as even part of their reason for their intentional frauds. Petitioners thus failed in their burden to prove a basis for *Garmon* preemption. *See Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380, 395 (1986).

Most significantly, the NLRB already has rejected that same claim and found Milne Truck did not engage in unlawful direct bargaining (App. 25a-26a). Petitioners' chameleon-like efforts to contradict the Board's finding in their favor and to foist their switch as a shield against petitioners' claims is disingenuous. The doctrine of judicial estoppel prevents them from doing that.

Petitioners' argument that any employer communication with employees about future job security is impermissible direct bargaining falls flat on its face. In *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339-40 (1944) the Court held that employers may enter into individual contracts of employment directly with employees without committing an unfair labor practice so long as the employer does not refuse to bargain with the representative union because of the individual contracts. *Accord Caterpillar v. Williams*, 482 U.S. at 395-96 (1987). Here, MEA made no allegation and petitioners offered no proof that Milne Truck ever refused to negotiate with the Teamsters or Machinists unions representing respondents because of or in conjunction with petitioners' fraudulent promises of secure employment.

With the inapposite case of *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), heavily relied on by petitioners, the Ninth Circuit dealt easily. *See* 960 F.2d at 1417. In *Medo Photo*, the employer directly bargained with the employees while at the same time negotiating with their union intending to coerce the employees into rejecting the union as their representative. 321 U.S. at 684. Here, by contrast, no negotiations were underway when petitioners made their misrepresentations, and the NLRB flatly rejected the unions' contention that they were ignored by finding no duty of Milne Truck to bargain with them. Respondent MEA has not alleged, nor have petitioners proven that a motivation for the misrepresentations was to coerce the employees into rejecting the unions as their representatives. Petitioners allege that the Ninth Circuit's ruling will "permit piecemeal agreements with employees". *See* Petition at 23. That claim is disingenuous. This case is not about separate, bargained-for agreements between employees and their employer without the union for the purpose of cutting the union out of negotiations. Rather, this conduct involves *lies* made directly to employees to keep them working on their jobs until petitioners could complete their scheme to loot Milne Truck's assets. There occurred no give-and-take between Milne and the respondents without the unions to reach an "agreement" contrary to the applicable labor contracts.

C. The Ninth Circuit's Decision In No Way Conflicts With Cases Cited By Petitioners From Other Circuits Since Those Cases Are Factually Distinguishable From The Matters *Sub Judice*; The Decision At Bar Is A Logically Sound Application Of *Garmon* And Its Progeny.

Petitioners principally rely on *Parker v. Conners Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066. That case was properly distinguished by the Ninth Circuit as not controlling here. *See* 960 F.2d at 1415-16. In *Parker*, the former employees alleged that the company and their union committed fraud *during negotiations* regarding the employer's decision to close the plant. That fraud arose out of two employee *concession agreements* and a third *negotiating session between the company* and the union *also* seeking further wage and benefit concessions. Id. at 1514. Additionally, the employees in *Parker* filed charges with the NLRB alleging that the same conduct in their state-law complaint constituted unfair labor practices. *Id.* at 1517.

The key facts here are diametrically opposite. MEA's complaint alleges no fraud or misrepresentation arising out of any collective bargaining or negotiating. There were never any labor negotiations about the decision of Milne Truck to close all of its operations (none were required). Unlike *Parker*, the NLRB here reached the merits of the unions' unfair labor practice charges and found them baseless. For the same reasons, petitioners' reliance upon *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) is misplaced. That case, too, properly was found inapposite by the Ninth Circuit. *See* 960 F.2d at 1416.

The salient facts here are incongruent with those of *Serrano* or *Parker*. Respondent MEA alleged that petitioners made affirmative, fraudulent statements ***directly to the employees.*** These frauds and misrepresentations occurred outside of any collective bargaining. Therefore, defendants' conduct could not constitute unfair labor practices. As the Court noted in *Garmon*, every case involving a question of *Garmon* preemption must be decided upon its own facts. 359 U.S. at 241. The Ninth Circuit properly found the unique facts here provided no basis for *Garmon* preemption.

D. Petitioners Propose A Radical Restructuring Of Federal Labor Law, Arguing That Nearly Every State-Law Tort Claim Is Preempted Under *Garmon*. They Would Upset The Delicate Balance Between State Regulation Of Traditionally Tortious Activities And Federal Regulation Of Unfair Labor Practices.

Petitioners spuriously accuse the Ninth Circuit of fashioning a new test for *Garmon* preemption. In fact, it is Petitioners who propose to fashion a radically new approach to *Garmon* preemption, if this Court were to grant the writ. Petitioners' novel idea that employers cannot communicate with employees outside of collective bargaining with the union is contrary to congressional intent. *See* NLRA § 8(c). The corollary to petitioners' proposal is that all employer communications with employees except through their unions are unfair labor practices. That broad departure has no basis in the labor laws.

In *Metropolitan Life*, 471 U.S. at 755 the Court found that Congress had no intent to interfere with minimum state labor standards which "affect union and nonunion employees equally, and neither encourage nor discourage the collective bargaining processes. . .". *See also, id.* at 757 ("the Court has recognized that it 'cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States' ").

The California anti-fraud statute is such a minimum standard of behavior that does not interfere with the collective bargaining scheme. Indeed, the applicable statutes under which respondents sue are titled under "Obligations Imposed By Law", "Without Contract. . .". Cal. Civ. Code §§ 1708-1711. These California laws have been in effect since 1872. If this Court now were to grant certiorari and adopt petitioners' proposed expansion of *Garmon*, the states' jurisdiction over matters traditionally regulated would be eliminated. That result would grossly distort the principles of federalism underlying the labor laws.

CONCLUSION

No principle of law relating to federal preemption of state-law claims under either § 301 of the LMRA or the *Garmon* doctrine would be clarified by granting a writ of certiorari in this case. To the contrary, granting certiorari here would provoke widespread uncertainty, if not anxiety among the lower courts in their application of the clear mandates of *Lingle* to claims of § 301 preemption. Petitioner' claims of conflict among the Circuit Courts of Appeal in application of *Garmon* preemption is specious. Consideration of this case would add nothing of substance to this Court's jurisprudence. Denial of the Petition for Writ of Certiorari is the only viable option before the Court, unless the Court should wish to revisit all the basic principles of this field. Thus, respondents respectfully request such denial.

Respectfully submitted,

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No. 92-65

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER;
DONALD E. MAYORAS; MILNE TRUCK LINES;
ELLIOTT BURNSIDE; CHARLES N. PASS; THOMAS MORTON;
JAMES BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK
LINES; RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN;
BRADFORD M. FREEMAN; RONALD P. SPOGLI,
Petitioners.

vs.

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual
Benefit Corporation, or in the alternative Steven Bishop,
Charles E. Tharp, Debra Bishop and Ella Tharp,
as representatives of the class of affected former employees of
Milne Truck Lines, Inc., and their spouses,
Respondents.

Petition for Writ of Certiorari
to The United States Court of Appeals
for The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents' brief in opposition to Milne's petition for writ of certiorari is, in its own right, a reason to grant the petition. Respondents do not dispute several of Milne's major contentions — in particular, that the Ninth Circuit's decision not to preempt fraud claims under Section 301 of the Labor Management Relations Act directly conflicts with analogous decisions from other Circuit Courts of Appeals.

Respondents' brief also demonstrates precisely the confusion Milne predicted this decision will engender. Starting with their "Questions Presented," respondents interpret the Ninth Circuit's decision to exclude any and all individual fraud claims from the reach of Section 301, indeed, to exclude virtually any tort claim. (Respondents' Br. at "Questions Presented," 6.) Respondents would also use this decision to forestall any claim of preemption under principles of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), if an employer has successfully defended before the National Labor Relations Board an unfair labor practice charge related to the same factual event or controversy alleged in a state law suit. (Respondents' Br. at "Questions Presented," 13-16.) These contentions are not merely departures from the authority of this Court, other circuits and the Board, they reveal the patent danger in the Ninth Circuit's decision: it may be used, as respondents clearly do, to undercut longstanding precepts of federal labor law. If not corrected by this Court, the Ninth Circuit's decision will significantly erode the doctrine of preemption under Section 301 and under the principles of *Garmon*, and it will inject more uncertainty and confusion into the body of federal labor law which depends on certainty and clarity to achieve Congress' goal of a uniform and cohesive national labor policy.

I.

THE NINTH CIRCUIT'S DECISION REGARDING SECTION 301 PREEMPTION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS.

As set forth in the petition (at 8-11), the Second, Seventh and Eleventh Circuit Courts of Appeals have concluded that resolution of state law fraud claims based on alleged misrepresentations about layoffs, plant closure and job security, such as those alleged here by respondents, requires interpretation of the collective bargaining agreement; accordingly, these courts have found such claims preempted by Section 301. *See e.g., Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); *Darden v. United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987); *Dougherty v. American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990); *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764 (7th Cir. 1991). Respondents simply (and rather remarkably) ignore these decisions from other Circuits, decisions which are factually indistinguishable and which unquestionably conflict with the Ninth Circuit's opinion.

Similarly, respondents fail to acknowledge that other Circuits (as well as this Court) have affirmatively rejected the Ninth Circuit's conclusion that interpretation of a collective bargaining agreement for purposes of Section 301 preemption is limited to the express terms of the collective bargaining agreement. (See Petition at 11-13.) The Ninth Circuit refused to find preemption because the pertinent collective bargaining agreements purportedly did not contain an express term that grants Milne the absolute right to shut down or which forbids Milne from making promises regarding job security. (10a-11a.)[1] As set forth in the petition, however, not only is it clear that the collective bargaining agreements expressly contemplated Milne's absolute right to close and expressly governed Milne's ability to make any individual promises (Petition at 3, 13 n.5), it is equally clear that this Court and other Circuit Courts of Appeals have uniformly rejected the view that the meaning of a collective bargaining agreement is determined by its four corners or is subject to common law contract principles. Rather, a collective bargaining agreement may contain implied terms which reflect the law of the shop, retained rights and custom of the industry, all subject to arbitral, but not judicial, interpretation. (Petition at 11-14.)

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[1] "10a-11a" refers to pages 10 and 11 of the appendix attached to the petition for writ of certiorari.

Instead of addressing these patent conflicts in the law which the Ninth Circuit's decision creates, respondents simply argue that the Ninth Circuit is "correct" (Respondents' Br. at 4-8), and that because the decision is supposedly "correct," the case presents no issue of importance. (Respondents' Br. at 9-12.) At this juncture, of course, whether the Ninth Circuit is "correct" is immaterial; the fact remains that a direct split in the Circuits exists on critical and recurring issues of federal labor law.

At any rate, respondents' assertion that the Ninth Circuit's decision is not important is belied by their own opposition brief. Respondents attempt to minimize the decision's import by virtue of purportedly "unique facts," yet neither the Ninth Circuit nor respondents ever identify the "unique" facts which would narrow its impact or which would distinguish this case from ***Mason, Dougherty, Darden*** or ***Smith***. In fact, there are none.

Moreover, it is quite clear that respondents do not themselves minimize the importance of the Ninth Circuit's decision and unabashedly rely on it to assert that no fraud claim based on alleged individual promises to employees, and indeed, no tort claim (except perhaps one directly based on contract) is preempted by Section 301. (Respondents' Br. at 6.) Similarly, respondents would rely on the decision to mandate that any "interpretation" of a collective bargaining agreement for purposes of Section 301 preemption be limited to only the express terms of the collective bargaining agreement. (Respondents Br. at 3.) Rather than a ruling confined to "unique facts," the decision, by respondents' own admissions, necessarily will affect many kinds of employment controversies which have long been subject to grievance and arbitration.

Respondents' preoccupation with the "state law" source of their tort ignores the fact that resolution of a tort whose nature is defined by state law may nonetheless involve interpretation of a collective bargaining agreement.[2] *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Challenges to drug testing based on state law privacy rights are perhaps the most analytically analogous to the instant fraud claims. Despite the state law basis of the right of privacy, courts have repeatedly held that an employee's reasonable expectations of privacy are a function of the powers and duties specified in the collective bargaining agreement and that state law privacy claims are, accordingly, preempted. *See e.g. Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988); *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987). The result — preemption of the state law claims — has been the same whether or not an "express" term governed the challenged practice. *See e.g. Laws*, 852 F.2d at 433.

For example, in a recent Seventh Circuit case, *In Re AMOCO Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992), plaintiffs, union employees covered by a collective bargaining agreement, filed suit in state court for invasion of privacy because the employer, who suspected employee misconduct, videotaped employees entering and exiting a locker room. *Id.* at 707. Following removal, the district court eventually remanded the case. The Seventh Circuit exercised its rarely used power to reverse the order of remand, based on a finding that the employees' state law privacy claims were artfully pleaded claims under Section 301. The employer argued that the collective bargaining agreement implicitly granted it the authority to conduct surveillance of its employees either by industry custom or by a reservation in the management's rights clause. *Id.* at 709. Judge Easterbrook, writing for the Seventh Circuit, did *not* (unlike the Ninth Circuit) interpret the contract to determine whether or not it could be construed in the manner suggested by the employer; instead he recognized that interpretation of a contract was in the first instance for the arbitrator, and concluded, accordingly, that the state law privacy claims were preempted by Section 301:

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[2] Again, respondents ignore another split in the Circuits: the Second and Eleventh Circuits, contrary to the Ninth Circuit, conclude that an employer's duty to disclose an intent to lay off employees is not a function of state law but of contractual agreement with the union. *Darden*, 830 F.2d at 1120; *Dougherty*, 902 F.2d at 203-204.

> "Plaintiffs concede that a collective bargaining agreement could authorize surveillance but observe that there is not one word in the compact about cameras, locker rooms, or surveillance in general. Amoco does not find this surprising, because on its view the subject is covered by the management-rights language. As Amoco sees things, everything that is neither regulated nor forbidden by the collective bargaining agreement is committed to its discretion by this residual clause. Thus, resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, which transmutes state to federal law."

* * *

> "Privacy in the workplace . . . is an ordinary subject of bargaining. The extent of privacy is a "condition" of employment. Even agreements that do not mention surveillance expressly may deal with the subject by implication. If Amoco were to discipline [the plaintiffs], the union could file a grievance and take the complaint to arbitration. An arbitrator, we doubt not, could overturn any discipline if he believed the surveillance unjustified. Damages remedies under state law would disrupt this process of accommodation and interpretation." *Id.* at 709-710.

A fraud claim depends on an employee's reasonable expectations no less than the right of privacy. Indeed, as the Ninth Circuit found, justifiable reliance is one of the essential elements of a fraud claim (9a-10a). A union employee cannot claim reasonable reliance on alleged individual promises regarding terms and conditions of employment such as job security, layoff, and continued plant operations without comparing the alleged promises with the terms and conditions of his employment set forth in the collective bargaining agreement. Moreover, if the alleged promises and collective bargaining agreement conflict, "in any way" the promises are, by the express terms of *this* collective bargaining agreement, unenforceable. (Petition at 6.) There is no way to determine if conflict exists without interpreting the collective bargaining agreement's treatment of job security and plant closure, including rights and duties dictated by implication or custom. Other Circuit Courts of Appeals recognize and accept these principles; the Ninth Circuit rejects them. In short, the Circuits are in sharp disagreement as to whether the collective bargaining agreement or state law determines the resolution of fraud claims based on alleged individual promises regarding terms and conditions of employment. Respondents' silence does not suggest otherwise.

II.

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS' CLAIMS ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT IS IN CONFLICT WITH AUTHORITY FROM THIS COURT, OTHER CIRCUIT COURTS OF APPEALS AND THE BOARD.

As set forth in the petition, at the center of respondents' complaint is the allegation that Milne waited some nine months before announcing its "secret" plan to close the plant. In the interim, Milne allegedly misled employees into thinking the plant would remain in operation and that their job security was assured. According to the express allegations in respondents' complaint, by the time Milne announced the closure, there was "no time" for the union to respond before the shutdown. (Petition at 5, 20 n.8.) Under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "Act"), Milne had a duty to notify the union at a "meaningful time" (i.e., close to the time of decision) and in a meaningful manner (i.e., truthfully, to the union, not fraudulently, to employees), if it was to meet its obligation to bargain in good faith over the effects of closure. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981). Respondents' allegations could not state more precisely conduct which, if true, would be not merely arguably, but unquestionably, prohibited by the Act.

Both respondents and the Ninth Circuit treat this contention in a surprisingly cursory fashion — the decision simply notes that since the Board dismissed the union's charges of bad faith bargaining over the plant closure, the Board "implied" that Milne met its effects bargaining obligations, and Milne's conduct thus is not prohibited by the Act. (21a.) Respondents take the Ninth Circuit's conclusion one step further and argue that whenever an employer successfully defends an unfair labor practice charge before the Board, that employer cannot then claim preemption under principles of *Garmon* if the employer is sued for conduct "arising from the same factual setting as that which gave rise to the NLRB complaint." (Respondents' Br. at "Questions Presented," 13-17.)

The Ninth Circuit's position and the gloss put on the decision by respondents simply turns *Garmon* preemption on its proverbial head. If a union employee pursues a charge before the Board on a claim that he was fired for union activity, and the Board dismisses the charge on the merits, under the Ninth Circuit's position, the dismissal would serve as evidence that the Board found the alleged conduct "not prohibited" by the Act; the employee could then sue for wrongful discharge in state court without the threat of preemption under *Garmon*. This is not the result intended by *Garmon*, and case authority is wholly contrary. (See Petition at 22 n.9.) Yet, intentionally or not, that is precisely what the Ninth Circuit encourages in its decision, as evidenced by respondents' brief.

Garmon preemption is not dependent on what was presented to the Board or even if anything was presented to the Board at all; rather, it depends on what "could be" presented to the Board. *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978). The issue is whether the allegations as set forth in the complaint allege conduct arguably prohibited or protected by the Act, regardless of the history of some different charge of unfair labor practice put before the Board. The Board's ultimate disposition on the merits of any particular set of facts is immaterial to a determination of the Board's jurisdiction over alleged conduct.

Moreover, respondents have consistently (and correctly) urged that their allegations in the state law claims are *different* than those that were before the Board. (Respondents' Br. at 15-16.) The Board's prior disposition of an entirely different set of facts on the merits cannot determine its jurisdiction over another, different controversy. And if the claims in the court and Board action were the same, the state law action would likewise be barred. *See Parker v. Connors Steel Co.*, 855 F.2d at 1510, 1517 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) ("the primary jurisdiction rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision, the claims are restructured as state law claims and pursued in state court"). Otherwise, under the Ninth Circuit's view, as adopted by respondents, the preemptive effect of *Garmon* is lost, and the test becomes simply one of exhaustion of remedies. A claimant would need only file a charge before the Board, and lose, either intentionally or unintentionally, and then pursue the same claim in state court. Such a result does nothing to preserve the Board's jurisdiction over allegations of conduct arguably prohibited or protected by the Act and presents employers with a Hobson's choice: launch a successful defense to a charge of unfair labor practice before the Board and run the risk of a suit in state court on the Ninth Circuit's new-found theory that the employer's conduct was "not prohibited" by the Act.[3] This Court should not countenance such a radical departure from the principles established in *Garmon*.

Respondents simply ignore the Ninth Circuit's departure from authority which establishes that intentional delay in giving notice of a plan to close the plant, and deceit of employees and their union about plant closure are precisely the claims which give rise to an unfair labor practice charge for bad faith effects bargaining under *First National Maintenance*. *See, e.g.*, *Chippewa Motor Freight, Inc.*, 261 N.L.R.B. 455, 459-60 (1982) (fact that employer had not deceived union or employees about its decision to close, had not made its decision substantially in advance of its notice, and had discussed its financial difficulties with union rendered two day notice timely pursuant to effects bargaining obligations). It is not merely "arguable," it is clear, in fact, that the Board would entertain charges that the employer deceived the union and employees about a decision to close, that it withheld its true intentions for too long a time and thereby failed to meet its effects bargaining obligations in good faith. Respondents' failure to acknowledge, or perhaps, to perceive, conflicting authority from the Board and federal courts and respondents' patent subversion of the *Garmon* test for preemption, based as it is on the Ninth Circuit's decision, underscore the need for this Court's intervention.

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[3] The confusion presented by the Ninth Circuit's decision pervades respondents' discussion of *Garmon* preemption criteria. Respondents drift back and forth between what was actually presented to the Board by the unions in this case and what is alleged in the complaint herein, suggesting that since the two controversies are not identical, there can be no preemption. "Here, the NLRB was presented with an entirely different controversy for *Garmon* purposes than MEA alleged in its state complaint. . . . The Ninth Circuit thus properly found that Garmon does not preempt here because the complaint raises issues not identical to the controversy the NLRB decided." (Respondent's Br. at 15-16.) As discussed above, the issue, of course, is not what was presented to the Board; otherwise oversight by the union or charging party could give rise to a state law suit for what was "omitted" despite the fact that what was omitted was clearly a controversy within the Board's jurisdiction.

In their brief, respondents, like the Ninth Circuit, also repeatedly contend that under federal law, employers may bargain directly with their employees and give direct promises of job security as long as it is done "outside of any collective bargaining." (Respondents' Br. at 13, 19, 22a-24a.)[4] Respondents, and the Ninth Circuit alike, have ignored the longstanding principles of this Court and the very language of the Act (Section 8(c)) which forbid direct promises of benefits made to employees regardless of the status of collective bargaining. Similarly, respondents, as did the Ninth Circuit, ignore the cases which establish that an unfair labor practice results whenever an employer engages in direct dealing or makes a direct promise of benefit to an employee represented by a union. *See, e.g. Martin Marietta Energy Systems and Oil, Chemical and Atomic Workers International Union*, 283 N.L.R.B. 173 (1987), *enforced*, 842 F.2d 332 (6th Cir. 1988); *Union Carbide Corp.*, 275 N.L.R.B. 197 (1985).

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[4] Respondents mischaracterize Milne's contentions. Obviously not all direct communications with employees are prohibited by the Act and Milne has never suggested this. Direct promises of employment benefits, however, are clearly proscribed. 29 U.S.C. § 158(c).

As the Sixth Circuit explained in *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986), alleged misrepresentations that a plant would remain open made after the conclusion of collective bargaining would nonetheless violate Section 8 of the NLRA, because "the duty to bargain unquestionably extends beyond the period of contract negotiations." *Id.* at 1283.[5] The Ninth Circuit's departure from these precedents, again unacknowledged by respondents, should not go unacknowledged by this Court, and the Court should grant the petition to ensure uniformity of decision.

CONCLUSION

For the reasons set forth herein and in Milne's petition for writ of certiorari, the Court should issue a writ of certiorari to review the decision and judgment below.

DATED: August 31, 1992.

Respectfully submitted,

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[5] Respondents seem to urge that union animus is also a requisite for bad faith bargaining. (Respondents' Br. at 18.) Where, as here, however, the allegations are that Milne bypassed the union entirely until it was "too late" and made individual promises regarding job security, Milne's subjective good or bad faith is immaterial: the allegations amount to a per se violation of the Act as a unilateral change in the collective bargaining agreement, direct dealing or a promise of benefit in circumvention of the union. *See NLRB v. Katz*, 369 U.S. 736 (1962); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Union Carbide Corp.*, 275 N.L.R.B. 197 (1985).

No. 92-65

In the Supreme Court of the United States

OCTOBER TERM, 1992

SUN CARRIERS, INC., ET AL., PETITIONERS

v.

MILNE EMPLOYEES ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state-law tort claim based on the allegation that an employer knowingly made misrepresentations concerning a plant closing to employees covered by a collective bargaining agreement is preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185.

2. Whether respondents' state court claims are preempted by the National Labor Relations Act, 29 U.S.C. 151 *et seq.*

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In the Supreme Court of the United States

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No. 92-65

SUN CARRIERS, INC., ET AL., PETITIONERS

v.

MILNE EMPLOYEES ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are Milne Truck Lines (Milne); its parent company, Sun Carriers (Sun), which acquired Milne in 1980; the former owners of Sun; several individuals who were directors of Sun or Milne; and two other trucking companies owned by Sun. In September 1986, Sun sold its stock to some of the individual petitioners in a leveraged buy-out. Pet. App. 3a. At the time of the buy-out, most of Milne's nonsupervisory employees were covered by collective bargaining agreements with the Western Conference of Teamsters (Western Conference).[1]

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[1] Twenty-five of Milne's mechanics were represented by lodges of the International Association of Machinists (IAM) under a separate agreement. Pet. App. 3a n.2.

Id. at 2a-3a. Those agreements—the National Master Freight Agreement (Master Agreement) and the Western States Area Supplemental Agreements (Supplemental Agreements)—contained provisions governing the impact of the closing of trucking terminals on the transfer and layoff rights of employees. *Id.* at 10a-11a, 38a.[2]

On September 8, 1987, Milne presented a proposal for midterm wage and benefit concessions to the Western Conference and stated that failure to agree to the concessions by September 11 would force Milne to close down for financial reasons. Pet. App. 3a. The Western Conference rejected Milne's proposal. On September 11, Milne closed all of its 33 terminals and began terminating its employees. *Ibid.*

2. On September 8, 1988, respondent Milne Employees Association (MEA), which was formed for the purpose of conducting this litigation and which represents more than six hundred former Milne employees (Pet. App. 2a, 3a, 32a),[3] filed an action in California state court against petitioners seeking damages for, *inter alia,* fraud, intentional and negligent misrepresentation, and intentional infliction of emotional distress, based on Milne's alleged conspiracy over a nine-month period to deceive its employees about its plans to cease operations.[4] As

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[2] In addition, the Master Agreement (Art. 6, Sec. 2) stated that "[t]he Employer agrees not to enter into any agreement or contract with its employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement," and further provided that "[a]ny such agreement shall be null and void."

[3] Forty-eight were managerial or other employees not covered by the prior collective bargaining agreements. Pet. App. 2a n.1.

[4] The complaint also asserted claims of breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and interference with prospective advantage. These claims were found preempted by Section 301 by both the district court and the court of appeals (Pet. App. 13a-16a, 39a-41a), and they are not at issue here.

the court of appeals explained (Pet. App. 3a), MEA alleged that Milne's management had come to a decision to shut down before January 1987, but that Milne management personnel held meetings with Milne employees after that date in which the employees were promised job security and asked to refrain from seeking other employment based on assurances that the company would continue in operation.[5]

3. Milne and the other defendants removed the state court suit to federal district court. The district court decided that the state tort claims with respect to the union-represented employees were preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, and should be dismissed as barred by the six-month statute of limitations for Section 301 claims. Pet. App. 30a-31a. The Court rejected the contention that the unionized employees' claims were preempted under *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), Pet. App. 31a, and it remanded the nonunion employees' claims to state court.

4. The court of appeals reversed the district court insofar as it held that the former union members' fraud and emotional distress claims were preempted by Section 301; it upheld the lower court's conclusion that those claims were not preempted under *Garmon.*[6]

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[5] Before the state court action was filed, three Teamsters Locals and the IAM filed unfair labor practice charges with the Regional Director of the National Labor Relations Board. Based mainly on the finding that Milne's bargaining obligation was with the Western Conference and not with the constituent locals, the Regional Director dismissed the charges. See Regional Directors' dismissal letters in Board Case Nos. 31-CA-16740, 32-CA-9183, and 32-CA-9242, attached as Exhibit A to the Defendants' Reply Memorandum in Support of Motion for Summary Judgment in the District Court [hereinafter, Exh. A, Dist. Ct. Reply Memo.]. See also note 14, *infra.*

[6] The court upheld the district court's conclusion that the union members' other nonfraud claims were preempted by Section 301. Pet. App. 13a-16a, 27a; and see note 4, *supra.*

a. In analyzing petitioners' claim of Section 301 preemption, the court stated that the "relevant inquiry is whether resolution of the [state law] claim requires the interpretation of a collective bargaining agreement." Pet. App. 8a (citing *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985)). It concluded that the requirements for preemption were not satisfied because a court resolving the state-law claims would have "no occasion to interpret the collective bargaining agreement itself, in part because these fraud claims do not originate in or refer to rights and duties derived from the * * * agreement." Pet. App. 11a. In analyzing the elements of MEA's state-law fraud claims to determine if their resolution required interpretation of the collective agreement, the court decided that resolution of the first three elements of the fraud claims—misrepresentation, knowledge of falsity, and intent to defraud—did not. They only involved "purely factual questions pertain[ing] to * * * the conduct and motivation of the employer." Pet. App. 9a (citing *Lingle*, 486 U.S. at 407). The court found that the justifiable reliance element of the fraud claims did require the court to "examine" the agreement to consider whether "reliance was justified in light of the [collective] agreements" that were then in force. Pet. App. 9a-10a. The court determined, however, that no provision of the collective agreements "arguably conflicts with Milne's promises regarding its continued operations and employee job security," so there was no need for "interpretation" of the agreement to resolve the state tort claims. *Id.* at 10a.[7]

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[7] The court also ruled that, "[i]nsofar as MEA's emotional distress claim * * * arises from the employees' discharge or termination," it is preempted because resolution of the claim will require interpretation of the collective bargaining agreements' terms relating to layoffs. Pet. App. 17a-18a. However, to the extent the claim arises from the alleged fraud and suppression of facts, it is not preempted because "no provision in the collective bargaining agree-

b. The court also held that the state-law claims were not preempted under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), because the alleged employer misrepresentations did not constitute an arguable failure to bargain in good faith that would bring the conduct within the exclusive jurisdiction of the Board. Pet. App. 18a. Although Milne had a duty to bargain over the effects of its decision to close, the court expressed doubt that Milne's failure to disclose its plans "weeks and months prior to closure" would arguably violate that duty where, as here, Milne eventually revealed its plans and offered to bargain about the effects of closure. *Id.* at 21a. In addition, the court found that, even if the alleged misrepresentations were arguably prohibited by the NLRA, the claim was not preempted under *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978), because the issues presented to the Board would be different from those presented in the tort action. Finally, the court found that the conduct at issue here would fall within the *Garmon* exception for conduct that implicates "deeply rooted" local interests because the State "has a 'substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm.'" Pet. App. 25a (quoting *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 511 (1983)).

DISCUSSION

The court of appeals properly applied the principles set forth in *Lingle, supra*, to conclude that respondent MEA's state-law fraud and emotional distress claims were not preempted by Section 301. Since there is no conflict in the circuits regarding the application of this Court's Section 301 authority to the specific issue presented, further review of petitioners' claims under Section 301 is not

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ments before us defines standards for * * * false representations to employees outside the collective bargaining process regarding continued company operation." *Id.* at 18a.

warranted. Although we disagree with the court of appeals' reasons for concluding that the state tort claims were not preempted under *Garmon, supra,* review of that question is similarly unwarranted. The lower courts are not in conflict regarding the application of *Garmon* to facts such as those at issue here. Accordingly, the petition for certiorari in this case should be denied.

1. a. This Court has held that Section 301 of the LMRA preempts not only lawsuits to enforce the terms of collective bargaining agreements, but also lawsuits in which "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp.* v. *Lueck,* 471 U.S. at 220. In *Lingle* v. *Norge Div. of Magic Chef, Inc., supra,* the Court held that, even though the employee in that case was covered by a collective bargaining agreement containing a "just cause" discharge clause, a state tort claim of retaliatory discharge was not preempted because its resolution involved "purely factual questions" pertaining to the conduct of parties and "does not require construing the collective bargaining agreement." 486 U.S. at 407. The Court stated that "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for [Section] 301 pre-emption purposes." *Id.* at 410.

Petitioners contend (Pet. 12-13) that the court of appeals misapplied *Lingle,* because evaluation of the justifiable reliance element of the fraud claim requires interpretation of the labor contract provisions that concern "protections, rights and duties" in the event of plant closure, the employer's "right to shut down," and the effect of conflicting extracontractual agreements. See Pet. 11-13 & n.5. Petitioners maintain that the "clear conflict" between Milne's rights under the contract and the individual promises it allegedly made to employees concerning its continued operation "foreclose[s] reasonable reliance" and defeats the employees' fraud claims.

We disagree with petitioners' analysis in two important respects.

(i) Even assuming the collective bargaining agreement grants Milne the authority to close terminals at any time, it does not reserve to Milne the right to make false statements regarding its intentions to close terminals in a manner that causes damage to others. Milne's exclusive right to determine when and whether to close terminals could not relieve it of the state-law obligation to refrain from lying about its intentions regarding exercise of that right, and thus could have no bearing on whether the company committed fraud under state law. As this Court observed in *Allis-Chalmers* v. *Lueck,* 471 U.S. at 212, the LMRA "does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." Since the employer's duty not to mislead its employees to their detriment derives from "state rules that proscribe conduct, [and] establish rights and obligations, independent of [the] labor contract," it would be "inconsistent with congressional intent" to find preemption of an action based on a violation of that duty. *Ibid.* Thus, although other circumstances could conceivably undercut the reasonableness of the employees' reliance on the employer's representations, the fact that the decision whether to close terminals was within Milne's exclusive authority could not, in itself, render unreasonable the employees' reliance on Milne's promises not to close. Because the existence of Milne's asserted contractual authority has little relevance to the merits of respondents' state fraud claim, the validity of the state claim is not "dependent" on any clause in the contract that might establish the employer's rights to close terminals. See *Lingle,* 486 U.S. at 408-409.[8]

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[8] Likewise, contract provisions governing job security in the event of closure have no substantial relevance to this dispute. As the court of appeals correctly observed, "MEA's claims arise from alleged promises that the company would not close, and not from promises regarding rights or procedures entitled to them if the

(ii) The need to examine a collective bargaining agreement to decide in the first instance whether the requirements for preemption are met should not be equated with the process of "interpreting" the contract to dispose of the merits of the state-law claim itself. Only when the terms of the collective bargaining agreement affect the outcome of the state-law dispute is preemption triggered under *Lingle*. Cf. *Consolidated Rail Corp.* v. *Railway Labor Executives Ass'n*, 491 U.S. 299, 303 (1989). See also Pet. App. 12a (in this context, "an examination is not interpretation"). As the Court stated in *Lingle*, 486 U.S. at 413 n.12 (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 211), "not every dispute * * * tangentially involving a provision of a collective bargaining agreement, is preempted by § 301."[9] Where, as here, the initial examination of a contract reveals that the state claims are not "contract dependent"—because no provision of the contract determines state-law liability—adjudication of the state claims should be permitted to go forward. Otherwise, employers could trigger preemption and deprive em-

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company closed." Pet. App. 11a. Also irrelevant to the claim is the provision barring employer-employee agreements that "in any way conflict[ ]" with the contract's terms, *id.* at 10a. Respondents do not contend that the employer's statements created individual contracts giving rise to a state claim for their breach, but rather that the statements constituted fraud. Moreover, as we discuss below, the mere fact that the court was required initially to examine the "no conflicts" clause in addressing the preemption question did not make the outcome of the state claim "dependent" on that term within the meaning of *Lingle*. See pp. 8-9, *infra*.

[9] Indeed, the Court in *Lingle*, 486 U.S. at 413 n.12, recognized that "a state-law claim may depend for its resolution upon both the interpretation of a collective bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby preempted."

ployees of state-law remedies merely by claiming, however implausibly, that the disposition of a state claim turned on some provision of the contract, thereby forcing a court to "interpret" the contract to decide that the contract did not bear on the outcome of the state lawsuit.[10]

b. Petitioners contend (Pet. 8-10; Reply Br. 2-6) that this case presents a conflict in the circuits respecting the application of the principles of *Lingle*. Although two post-*Lingle* cases [11] dealing with plant closings have held state fraud claims preempted, it is not at all clear that those courts of appeals would have found petitioners' claims preempted. As the Court in *Lingle* cautioned, preemption of claims based on a state-law duty depends on the particular duty at issue and the precise terms of a collective agreement, which can vary considerably from case to case. We accordingly do not believe that certiorari is required to resolve a conflict in the circuits.[12]

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[10] In contending further (Pet. 15-16) that permitting state tort suits involving the employment relations of unionized employees will result in the "disintegration of the arbitration process" because employees will "sidestep" grievance procedures, petitioners simply quarrel with the logic of *Lingle*, see 486 U.S. at 409-410. The Court in that case recognized that its preemption doctrine contemplated the availability of parallel remedies under grievance/arbitration procedures and state law for similar employer misconduct.

[11] A number of the cases cited by petitioners (Pet. 9-10; Reply Br. 4) predate *Lingle*, and thus were decided without benefit of the Court's decision in that case. See *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986); *Darden* v. *United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987); *Strachan* v. *Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985); *Kirby* v. *Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987). *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988), was decided less than a month after *Lingle* and does not discuss *Lingle*.

Petitioners contend (Pet. 9 n.4) that the courts are also in conflict over whether state claims may be preempted under Section 301 on the basis of an employer defense invoking the terms of a collective bargaining agreement, see, *e.g.*, *Schacht* v. *Caterpillar*, cert. denied, 112 S. Ct. 1306 (1992) (No. 91-1095), or on the basis of individual pre-hire agreements concerning terms and conditions of employment. Neither of these issues is properly presented here. The court of appeals did not reject petitioners' preemption claim based upon the view that the contract terms were relevant only to a defense. But cf. *Smith* v. *Colgate-Palmolive Co.*, 943 F.2d 764, 770-771 (7th Cir. 1991) (employer's argument that reliance is unreasonable under labor contract treated as defense to fraud claim). Nor is there any issue respecting individual agreements, since respondents' claim sounds in tort, not in breach of individual employment contracts. See note 8, *supra*.

In *Dougherty* v. *American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990) (Pet. 10), unionized employees contended that the defendant company fraudulently induced them to transfer to another plant by failing to disclose plans to reduce the workforce at that plant in the future. Relying on this Court's opinion in *Allis-Chalmers Corp.* v. *Lueck*, *supra*, the court found that the company's "obligations to provide accurate information" concerning its intentions were "inextricably intertwined" with the collective bargaining agreement, which had been modified to "define the employment rights of transferred employees." The court appears to have concluded that any duty on the part of the employer to disclose future workforce reduction would arise, if at all, under the contract. However, the court's discussion of the contract is not sufficiently detailed to make clear how its contents might be relevant to the existence or violation of such a duty. Thus, it is difficult to say whether *Dougherty* is inconsistent with the decision below.

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[12] There is not even an arguable conflict between the decision below and *In re Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992) (Reply Br. 4). In that case, the court found that a state invasion-of-privacy claim based on the employer's surveillance of a company locker room was preempted. Resolution of the state claim depended on whether the employer "invaded [employees'] objectively reasonable expectation of privacy," which depended on whether the "management rights" provision of the labor contract had reserved to the employer the right to conduct unlimited surveillance of its premises. 964 F.2d at 710. See also *McCormick* v. *AT&T Technologies, Inc.*, 934 F.2d 531, 533, 536 (4th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 912 (1992). In the instant case, in contrast, the contract did not undermine the reasonableness of the employees' reliance on Milne's statements concerning plant closings: Although Milne had the right to close its terminals, it did not reserve the right to misrepresent its intentions to close its terminals.

The Ninth Circuit has in fact found preemption of state invasion-of-privacy claims where the expectation of a right to privacy required an interpretation of a collective bargaining agreement. See *Stikes* v. *Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990) (discharge for refusal to submit to random search for theft screening), cert. denied, 111 S. Ct. 2015 (1991); *Schlacter-Jones* v. *General Telephone*, 936 F.2d 435 (9th Cir. 1991) (drug testing).

In *Smith* v. *Colgate-Palmolive Co.*, 943 F.2d 764 (7th Cir. 1991) (Pet. 10), the court held that state law claims were preempted because the reasonableness of the employees' reliance on promises of a "permanent job" at a plant to which they transferred after a plant closure required interpretation of a collective bargaining agreement. The terms of the contract had the effect of divesting the employees of their seniority for purposes of layoffs at the new plant, 943 F.2d at 771, and also contained a broad "merger clause." The merger clause stated that the agreement "embodies all the terms and understandings which the Company and the Union have made with respect to the company's plant" and was binding on all union employees. *Id.* at 765~~7~~. The court held that the reasonableness of the employees' reliance on the promises that their positions at the new plant would be "permanent" would "inevitably turn" on the interpretation of these clauses of the contract. *Id.* at 771. The court of appeals appears to have decided that the test for preemption was satisfied because a jury hearing the state law fraud claim would have to determine whether employees who were divested of certain seniority rights under the contract could reasonably believe that they would not be laid off. *Id.* at 769. In contrast, the court of appeals in this case concluded that the terms of the contract at issue here did not even arguably refute the reasonableness of the employees' reliance. Pet. App. 10a.

In summary, the difference in outcome here and in the cases cited by petitioners may well turn on differences in the facts and claims at issue rather than on a disagreement over the correct legal standard or its application. Thus, there is no clear conflict in the courts of appeals regarding the analysis of the Section 301 preemption issue presented in this case.

2. In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Court required the States to "defer to the exclusive competence of the National Labor Relations Board" to regulate activity arguably protected or arguably prohibited by the National Labor Relations Act (NLRA). *Id.* at 245. However, the Court excepted from this rule conduct that is "a mere [] peripheral concern" of the NLRA and activity that "touche[s] interests so deeply rooted in local feeling and responsibility" that, absent "compelling congressional direction," preemption cannot be inferred. *Id.* at 243-244. See also *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977); *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983). In *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), the Court added that state claims arising out of conduct that was arguably prohibited by the NLRA are not preempted unless "the controversy presented to the state court is identical to * * * that which could have been * * * presented to the Labor Board." *Id.* at 196-197.

Applying these principles, the court of appeals found that respondents' state fraud claims were not preempted under *Garmon* because the conduct alleged was not arguably prohibited by the NLRA, and, in any case, the controversy presented to the Board would be different from the issue presented in the state court action. Although we believe that the court of appeals incorrectly analyzed the range of conduct arguably prohibited by the NLRA, and that petitioners' assertion that there is sufficient similarity of claims to warrant preemption finds some support in this Court's precedents, we do not believe the issue is ripe for review. No other court of appeals has decided the preemption issue presented here in a manner inconsistent with the decision below.

a. The court of appeals erroneously concluded that petitioners' misrepresentations to individual employees were not part of a pattern of conduct that was arguably prohibited by the NLRA (and therefore within the Board's jurisdiction) because those statements could have had no bearing on whether petitioners failed to "engage in effects bargaining with the union at a meaningful time" in violation of the Act, see Pet. App. 21a. The court explained that the Act could not have required Milne, in fulfilling its obligation to engage in meaningful bargaining over effects, to reveal a decision to close "weeks and months prior to closure." *Ibid.* That statement misreads Board precedent, under which an employer's obligation to reveal its plans to close a facility could, depending on the circumstances, accrue as soon as those plans become definite.[13] Thus, in adjudicating an unfair labor practice charge, it would be possible for the Board to hold that, if respondents' allegations that Milne made the decision to close the plant before January 1987 were true, petitioners' conduct in failing immediately to reveal that decision (and in subsequently misrepresenting to employees that the plant would remain open) constituted a refusal to bargain in good faith in violation of the Act. At the very least, Milne's alleged fraudulent concealment of its plan to close its terminals would have some bearing on the question whether Milne fulfilled its duty to bargain in good faith with the union over the effects of its decision to close.[14]

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[13] The court of appeals recognized that, although the decision to close part of an employer's business for economic reasons is not a mandatory subject of bargaining, the employer must bargain in good faith with the employee representative about the effects of such a decision "in a meaningful manner and at a meaningful time." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 682 (1981). The Board has long held that, to fulfill this obligation, an employer must provide a union with sufficient notice of an impending closure to permit the union to engage in meaningful bargaining concerning effects. See *Royal Plating & Polishing Co.*, 160 N.L.R.B. 990, 994 (1966) (citing cases). The Board has interpreted this requirement to mean that, absent special circumstances, an employer may not conceal its decision to close if that concealment would permit the employer to avoid bargaining until "the collective strength of the employees' bargaining unit ha[s] been dissipated." *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 389 (1968). Accord *Metropolitan Teletronics Corp.*, 279 N.L.R.B. 957, 959 (1986), enforced, 819 F.2d 1130 (2d Cir. 1987); *Kirkwood Fabricators, Inc.*, 285 N.L.R.B. 33, 35 (1987), aff'd, 862 F.2d 1303, 1306-1307

(8th Cir. 1988); *Riedel International d/b/a Willamette Tug & Barge Co.*, 300 N.L.R.B. 282 (1990); see also *Penntech Papers, Inc.* v. *NLRB*, 706 F.2d 18, 26-27 (1st Cir.), cert. denied, 464 U.S. 892 (1983).

The court mistakenly cited (Pet. App. 21a) *Creasey Co.*, 268 N.L.R.B. 1425 (1984), for the proposition that an employer is never obligated to give notice of a plant closing weeks or months before it takes place. *Creasey*, however, stands for the proposition that an employer may delay effects bargaining in good faith when there are overriding business justifications for doing so. The Board in that case found that the employer's need to dispose of perishable inventory justified delaying notification of a closure decision until four days before the plant actually closed.

[14] The court of appeals also stated that, in dismissing unfair labor practice charges filed against Milne, "the Board itself implied that [the company's] notice to the Teamster bargaining agent in late August 1987 * * * satisfied its duty to bargain in good faith." Pet. App. 21a. However, the Board never had occasion to decide whether the company satisfied its duty to bargain over the effects of the closing. The comments to which the court of appeals refers were made by the Regional Director in the course of dismissing charges brought, not by the employees' bargaining representative, the Western Conference, but by a constituent local. Moreover, the local did not question the adequacy of effects bargaining in that charges, but rather accused Milne of repudiating a previous collective bargaining agreement and engaging in direct bargaining with employees. See Exh. A, Dist. Ct. Reply Memo.; see also Br. in Opp. 14. Although the locals brought additional charges concerning Milne's closure, the Regional Director dismissed them chiefly

b. The court of appeals' application of the second requirement for *Garmon* preemption stated in *Sears*—that a controversy be "identical to * * * that which could have been * * * presented to the Board," 436 U.S. at 197-198—is also open to question in light of this Court's later decision in *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669 (1983). See Pet. App. 24a. In *Jones*, a company employee alleged that a union had caused an employer not to keep its promise to hire him for the job of construction supervisor. The Court acknowledged that the state cause of action was broader than the controversy before the Board: under state law *any* tortious conduct that interfered with contractual relationships was actionable, whereas such conduct was arguably prohibited by the NLRA only if the union was found to have "intimidated and coerced" the employer into breaking the contract. 460 U.S. at 682. Although the state law claim and the unfair labor practice violation in *Jones* shared only some elements, the Court nevertheless found the state claim preempted. The Court ruled that it was sufficient that the "same crucial element" had to be proved in both the state tort action and the proceedings before the Board: "the discharge must be shown to be the result of Union influence." *Ibid.*

In this case, the court of appeals found (Pet. App. 24a-25a) that petitioners' state-law claims would not present an "identical controversy" to the one that could have been presented to the Board. The court reasoned that, although the controversies overlapped in some respects, the Board would necessarily focus on the impact

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because Milne had no obligation to bargain with the charging unions, but only with the Western Conference. The IAM, which represented some of Milne's employees, did file a charge challenging the adequacy of effects bargaining, but it was withdrawn. The Western Conference did not file any charges at all, and never complained about the timeliness of the effects bargaining. See Exh. A, Dist. Ct. Reply Memo.; note 5, *supra*.

of the alleged misrepresentations on the unions and the bargaining process, whereas the state court would look to the impact of those misrepresentations on the employees. The court of appeals did not discuss the application of the *Jones* decision at all, and thus failed to address whether the state law claims could be said to share a "crucial element" with any unfair labor practice charge that could have been brought before the Board. Instead, the court of appeals relied on the Court's decisions in *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977), and *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), to find that this case fit into the exception to preemption for conduct that implicates interests "deeply rooted in local feeling and responsibility," see *Garmon*, 359 U.S. at 243-244. The court explained that "California has a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm." Pet. App. 25a (quoting *Belknap*, 463 U.S. at 511).

c. We do not believe it is necessary for the Court to determine how to harmonize the principles of *Belknap*, *Sears*, and *Jones* in analyzing this case, because the courts of appeals have not come to different conclusions concerning the *Garmon* issue presented here. While several courts of appeals have considered whether the NLRA preempts state fraud and emotional distress claims arising from employer conduct having some relation to plant closings, preemption has been predicated upon allegations that the misrepresentations occurred in the course of, or as an outgrowth of, formal collective bargaining. The employer conduct in this case took place in a very different context.

In *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989), for example, the employees filed a state-law fraud action based upon promises and statements made by the company during the course of active bargaining with the union following the company's announcement that it would close a plant unless the union made wage and benefit concessions. The court of appeals held that the action in state court was preempted under *Garmon,* reasoning that the state claims "are in substance allegations that the Company breached its duty to bargain in good faith in negotiating the concessions and in failing to reveal the likelihood of a plant closure despite the concessions." 855 F.2d at 1516.

Similarly, in *Kolentus* v. *Avco Corp.,* 798 F.2d 949 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987), the employees alleged that the employer committed fraud by misleading the union, during collective bargaining, concerning the employer's intention to close a plant. See 798 F.2d at 960. The court of appeals concluded that, because the complained-of conduct occurred during a period in which the employer had an ongoing duty to bargain with the union, "the controversy presented by the state claim is identical to that which could have been presented to the NLRB." *Id.* at 961. The state fraud claim in *Serrano* v. *Jones & Laughlin Steel Co.,* 790 F.2d 1279 (6th Cir. 1986), was also based on alleged misrepresentations made by company representatives during concession negotiations with the union and during meetings with employees considering ratification of a proposed concession agreement. The plaintiffs claimed that the employer lied about its intention to rebuild a plant, and that, after the agreement with the union went into effect, the employer failed to disclose its intention to shut down. See 790 F.2d at 1282-1283. The court reasoned that, because the employer's conduct underlying the state court claim took place during the bargaining period, the misrepresentations and failure to disclose "arguably would be prohibited by the Labor Act as bad faith bargaining." *Id.* at 1283.[15]

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[15] The state tort allegations in *Serrano* were based in part on a failure to disclose the impending plant closure after the concession agreement was signed. The court reasoned, however, that "[s]ince the duty to bargain unquestionably extends beyond the period of

Thus, in *Serrano, Parker*, and *Kolentus*, the employer conduct forming the basis of the state tort claims occurred in the course of, or as an outgrowth of, formal contract negotiations with the union. The employee lawsuits were directed at reforming the collective agreement and recouping contract benefits the employer had obtained through fraud. Therefore, there was little question that the challenged employer conduct was part of the collective bargaining process subject to exclusive regulation by the Board. In this case, in contrast, the employer's alleged misrepresentations were made to individual employees rather than to the union, outside the context of formal bargaining, and before it was clear that negotiations related to the plant closing should have begun. It would appear that this is the only case that has considered the issue of *Garmon* preemption under these circumstances, and there is reason to believe that other courts might well resolve a similar case in the same way. See *Wells* v. *General Motors Corporation*, 881 F.2d 166, 171 (5th Cir. 1989), cert. denied, 495 U.S. 923 (1990).[16]

In sum, the courts in *Serrano, Kolentus*, and *Parker* did not have occasion to decide whether the type of employer conduct at issue here was related to a violation of the duty to bargain in a manner that brought the conduct

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contract negotiations, defendant had the duty to disclose any information they had concerning a shutdown * * * as it related to the [bargaining agreement] during the entire period of that agreement." 790 F.2d at 1283 (quoting district court opinion).

[16] The court of appeals in *Wells* considered state fraud claims that were based on efforts by an employer "to induce individual employees to accept [voluntary termination] benefits," after an agreement negotiated by the union had been signed. In finding that there was no preemption, the court reasoned that the employer's alleged inducements "had no direct bearing upon the collective bargaining process" and thus were made outside the bargaining context. Although there arguably is some tension between *Wells* and *Serrano*, those cases are factually distinguishable from, and not inconsistent with, the decision below.

within the Board's exclusive jurisdiction. Therefore, contrary to petitioners' suggestion, there is no disagreement in the circuits regarding the *Garmon* preemption issue presented by this case. Because *Garmon* preemption will often turn on differences in the circumstances of the employer's conduct, the preemption analysis is intensely fact-specific. We accordingly think that review of the question here should at least be postponed until other courts of appeals have had an opportunity to consider the application of *Garmon* to more directly analogous conduct.[17]

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[17] There is no merit to petitioners' contention (Pet. 21-23) that the state-law claims should be found preempted because they are based on representations to individual employees that could arguably form the basis for a charge before the Board of direct dealing or a unilateral change in the collective bargaining agreement in violation of the NLRA. As the court of appeals correctly found, the company's assurances to employees concerning job security could not reasonably be regarded as the type of direct bargaining in derogation of the union's authority of which this Court disapproved in *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944). Not only is this decision consistent with the Court's precedents concerning direct dealing with unionized employees, but petitioners have not alleged any conflict in the lower courts' application of those principles in the context of a claim of *Garmon* preemption based on possible direct dealing. Thus, even if that argument for preemption had some merit, there would be no reason for this Court to grant review to consider that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

SUN CARRIERS, INC.; ALBERT L. LABINGER;
DONALD E. MAYORAS; MILNE TRUCK LINES; ELLIOTT
BURNSIDE; CHARLES N. PASS; THOMAS MORTON; JAMES
BRADFORD; ST. JOHNSBURY TRUCKING; JONES TRUCK LINES;
RIORDAN FREEMAN & SPOGLI; RICHARD J. RIORDAN;
BRADFORD M. FREEMAN; RONALD P. SPOGLI,
Petitioners,

VS.

MILNE EMPLOYEES ASSOCIATION, a non-profit Mutual Benefit
Corporation, or in the alternative Steven Bishop,
Charles E. Tharp, Debra Bishop and Ella Tharp,
as representatives of the class of affected former employees of
Milne Truck Lines, Inc., and their spouses,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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**ON PETITION FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT**

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PRELIMINARY STATEMENT

The Solicitor General, at the invitation of this Court, has filed a brief advising the Court to deny the petition for writ of certiorari. The Solicitor General's advice is ill-founded, and petitioners urge this Court to grant the petition.

The United States presumably has the greatest interest in the second "Question Presented" — whether respondents' state law claims are preempted under the principles of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959) — because of the jurisdictional concerns of the National Labor Relations Board (the "Board"). With respect to this question, the Solicitor General agrees with petitioners that the conduct alleged is arguably prohibited under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("the Act") and that the Ninth Circuit erred in holding otherwise. The Solicitor General also takes issue with the Ninth Circuit's conclusion that the state law claims are not sufficiently identical with the unfair labor practice charge that would be before the Board and criticizes the Ninth Circuit for ignoring this Court's decision in *Operating Engineers v. Jones,* 460 U.S. 669 (1983). Despite the Solicitor General's disagreement with the Ninth Circuit's decision, he states that review of the decision is unwarranted because he does not perceive clear conflict among the circuit courts of appeals. The Solicitor General seriously misapprehends the nature of the conflicts presented by the Ninth Circuit's decision and he overlooks, as an independent reason for granting certiorari, the Ninth Circuit's departure from this Court's decisions in *Garmon* and *Jones.*

With respect to the first "Question Presented" — preemption under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301") — the Solicitor General agrees with the Ninth Circuit that respondents' state law claims for fraud and emotional distress are not preempted. Although the Solicitor General admits that several courts have reached the opposite conclusion under similar facts, he urges the Court to deny review because he believes that the conflict is not sufficiently clear. No clearer conflict could be presented. Moreover, the Solicitor General ignores the self-admitted confusion over Section 301 preemption rampant in the lower courts, which underscores the need for this Court's intervention. Even if the Solicitor General were correct that the conflict in the circuits is not precisely defined, this

Court should nonetheless clarify these recurring and important questions of federal law, which have left the lower courts befuddled and uniform national labor policy an elusive ideal.

I.

THE NINTH CIRCUIT'S DECISION PRESENTS A CLEAR CONFLICT WITH OTHER CIRCUIT COURTS' SECTION 301 DECISIONS AND DEPARTS FROM THE AUTHORITY OF THIS COURT.

The Solicitor General agrees with the Ninth Circuit's conclusion that Section 301 does not preempt respondents' state law claims for fraud and emotional distress based on allegations that they were falsely promised job security after Milne had allegedly decided to close its trucking facility. The Solicitor General's opinion on the merits of the controversy, of course, is secondary to the issue of whether review is justified; a few points, however, should be addressed.

Petitioners do not generally quarrel with the Solicitor General's proposition that Section 301 preemption depends upon the existence of a term in the collective bargaining agreement which affects the outcome of the state law claim. Petitioners do dispute the Solicitor General's requirement that Section 301 preemption depends upon a specific term in the collective bargaining agreement which prohibits the precise conduct complained of. Indeed, following the Ninth Circuit's lead, the Solicitor General suggests that the only term which could affect an employee's justifiable reliance on alleged false promises of job security would be one which would "reserve to Milne the right to make false statements regarding its intentions to close terminals in a manner that causes damage to others," a provision which would be illegal under state law and for which Milne could not lawfully contract. (Solicitor General's Br. at 7.) Because no collective bargaining agreement can meet this requirement lawfully, the Solicitor General implicitly contends that a state law fraud claim could never be preempted by Section 301.

The several circuit courts which have deemed similar fraud claims preempted have obviously rejected such a restrictive view of Section 301 preemption, as discussed *infra*. Instead, these courts recognize that when a court's resolution of a state law claim involves an assessment of the reasonable expectations of union employees and the power of the employer, the collective bargaining agreement plays a crucial and pivotal role.

This Court, too, has rejected such a narrow view of "contract interpretation." In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court did not examine the collective bargaining agreement to make sure a specific term permitted the employer to harass employees who filed disability claims as alleged by the plaintiff; in fact, the Court pointedly eschewed such a narrow reading of a collective bargaining agreement, and left it to the arbitrator to determine if the manner of processing disability claims violated any express or implied duty in the contract. *Id.*at 218-20.

In this case, however, rather than leaving to the arbitrator the task of assessing the reasonableness of employees' reliance on the alleged fraudulent representations, the Solicitor General would give that task to a jury with the instruction that the collective bargaining agreement is irrelevant to its consideration of the issue. It is not irrelevant. The Solicitor General minimizes the importance of the several provisions in the pertinent collective bargaining agreements including one which prohibits Milne from making any individual employee contracts which "in any way" conflict with the collective bargaining agreements. (Solicitor General's Br. at 7 n.8.) If an alleged individual agreement promising job security is enforceable, it does conflict with Milne's right to shut down its operations, which, as the Solicitor General assumes, is a right reserved to Milne in the collective bargaining agreements. The reasonableness of a union employee's reliance on a promise of indefinite job security, as alleged by respondents, can only be assessed by considering the circumstances of his employment, including his knowledge that the terms and conditions of his employment are governed by a collective bargaining agreement. When that collective bargaining agreement provides that the employer enjoys the exclusive right to dictate operational requirements — including how long employees will remain employed — the collective bargaining agreement plays a pivotal role in assessing a union employee's reasonable reliance on a promise of indefinite employment.[1]

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[1] Even the Ninth Circuit recognized the tension between the alleged individual promises and collectively bargained agreements. It determined that

The Solicitor General, then, is mistaken in his view that an employee's reasonable reliance on alleged individual promises of job security is divorced from the different expectation of job security set forth in the collective bargaining agreement. Any individually "negotiated" restriction on Milne's right to shut down — such as an enforceable promise of job security — necessarily conflicts with Milne's contract rights, triggers the "no-conflicts" provision in the collective bargaining agreement, and inextricably links an employee's justifiable reliance on the individual promise with the collective bargaining agreement. More significantly, the Solicitor General is mistaken in his view that a state court jury would have no cause to interpret the collective bargaining agreement in order to determine if the employees reasonably relied on the allegedly false promises of job security.

Although the Solicitor General acknowledges that other courts of appeals have deemed similar claims in analogous circumstances preempted, he contends that the conflict is not precise. The Solicitor General summarily dispenses with several cases in petitioners' brief because they were decided before *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). (Solicitor General's Br. at 9 n.11.) There is no suggestion — even by the Solicitor General — that these

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respondents' contract claims (based on the same alleged promises of job security) were preempted by Section 301 because the "scope" of the employees' right to job security is a function of the collective bargaining agreements, and the collective bargaining agreements address "what types of disruption of the contractual or economic relationship between Milne and the employees are allowed." (Petition at 14a, 16a.) The analysis should not change merely because the allegations are relabeled as "fraud" claims. Otherwise, the nonsensical result is that the employees may not ignore the terms of the collective bargaining agreements and may not rely on alleged misrepresentations to form individual contracts but may ignore the same collective bargaining agreements and rely on those same alleged misrepresentations to maintain a state law claim for fraud. Even if respondents' allegations were true, where, as here, Milne did nothing more than what it was entitled to do under the collective bargaining agreement, i.e., shut down the plant, the propriety of its conduct should be governed by that agreement. See *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 662 (7th Cir. 1992) (claim for fraud based on termination of employment preempted by Section 301 when employer merely exercises rights under collective bargaining agreement, thereby requiring its interpretation).

cases would have been decided differently after *Lingle* or that their holdings or analyses are or should be viewed with disfavor. To the contrary, cases such as *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986), have been followed post-*Lingle*, (*see, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) *cert. denied*, 490 U.S. 1066 (1989)), and they should not be ignored. The pre-*Lingle* cases reject the Solicitor General's analysis, just as they conflict with the Ninth Circuit's decision. (See Petition at 9-10.)

The Solicitor General acknowledges that *Dougherty v. American Telephone & Telegraph Co.*, 902 F.2d 201 (2d Cir. 1990), reached a result opposite to the Ninth Circuit under similar circumstances, but states that the collective bargaining agreement was not sufficiently discussed in the Second Circuit's opinion to give rise to a clear conflict. It is evident from the Second Circuit's opinion, however, that the court did not expect the collective bargaining agreement to fulfill the Ninth Circuit's and Solicitor General's requirement that there be an express provision giving the employer the right to lie about plant closure. The Second Circuit simply recognized that any obligation to accurately disclose plans to shut down was a function of the collective bargaining agreement and the aggrieved employees were limited to the grievance and arbitration remedy provided therein. *Id.* at 204.

The Solicitor General's treatment of *Smith v. Colgate Palmolive Co.*, 943 F.2d 764 (7th Cir. 1991), is even more cursory. He simply suggests that no conflict between the circuits exists because the Seventh Circuit found that plaintiffs' fraud claim, in particular, the element of reasonable reliance, implicated the terms of the collective bargaining agreement, whereas the Ninth Circuit reached the opposite conclusion (precisely the conflict petitioners contend justifies review by this Court). (Solicitor General's Br. at 11-12.) The most striking conflict, however, is that in *Smith* the court presumed it was the arbitrator's province to assess the employees' reasonable reliance on promises of job security upon transfer in light of a "merger" clause and a provision in the collective bargaining agreement which provided for loss of seniority upon transfer. *Id.* at 771. Milne's collective bargaining agreements are similar. They not only anticipate plant closure and layoff but, in addition, they contain a provision which expressly proscribes the formation of an individual contract which "in any way" conflicts with the collective bargaining agreement (which if not a "merger" clause, is at least akin to one). A Milne employee would have little cause to reasonably rely on alleged promises of job security because none is offered in the collective bargaining agreements, the agreements reserve to Milne the exclusive right to decide the plant's operational requirements, and any curb on that right imposed by an individual agreement is made expressly void. Yet, the Ninth Circuit and Solicitor General would deem these terms irrelevant to an assessment of reasonable reliance.

The Solicitor General's preoccupation with minor factual differences among the circuit courts' decisions overlooks the factual commonalities among the above-cited cases and this case. All of the cases concern collective bargaining agreements containing grievance and arbitration as the exclusive remedies for disputes over terms and conditions of employment, in particular termination and layoff. All of the cases share similar allegations — that the employer failed to disclose its intention to close its facility or reduce operations and misled its employees with promises of job security. None of the collective bargaining agreements contains a provision permitting fraudulent promises to employees, which the Ninth Circuit and Solicitor General suggest is the only provision which would "conflict" with an alleged fraudulent individual promise of job security and foreclose reasonable reliance. All of the circuits except the Ninth Circuit found state law claims for fraud preempted. Yet the Solicitor General advises the Court to wait for a more precise conflict. Petitioners respectfully submit that the inter-circuit conflict presented by the Ninth Circuit's decision is clear and that passage of time could produce no stronger conflict.

The inter-circuit conflict is not the only reason this Court should grant review. For some years there has been collective and considerable gnashing of teeth among the lower courts at the difficulty in applying consistently Section 301 preemption principles, even after *Lingle*. *See, e.g., Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991) (court acknowledged that despite authoritative statements in *Lingle* and *Allis-Chalmers*, "[i]n reality, section 301 has been the precipitate of a series of often contradictory decisions, so much so that 'federal preemption of state labor law has been one of the most confused areas of federal court litigation.' " (quoting Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims, 99 Yale L.J. 209 (1989)); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 539 (4th Cir. 1991) (Phillips, J. dissenting) ("[my] disagreement . . .

simply reflects a wider inter-circuit conflict on this issue [Section 301 preemption analysis] that has developed in recent years as the lower federal courts have sought to apply the Supreme Court precedents . . ."), *cert. denied*, 112 S.Ct. 912 (1992); *Commodore v. University Mechanical Contractors, Inc.*, 839 P.2d 314, 318 (Wash. 1992) ("*Lingle* . . . gives little guidance as to what constitutes a state provided right. As a result, courts are still struggling to ascertain when a claim's resolution actually will involve interpretation or consideration of the CBA, and section 301 cases are still far from uniform or consistent, varying widely in their holdings, even after *Lingle*").

Quite apart from the conflict in the circuits, then, this case presents recurring and important issues of Section 301 preemption and provides an appropriate vehicle for this Court to promulgate needed guidance if the lower courts are to issue reconcilable results. Although this Court should ensure that truly independent state law claims proceed without interference of federal law, Section 301 preemption must have a scope broad enough to serve Congress' intent to preserve the vitality of grievance and arbitration as the preferred method of resolving claims such as respondents', which concern terms and conditions of union employment governed by a collective bargaining agreement. If decisions such as this one are allowed to stand, long-established and fundamental labor law cases such as *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), will be undermined, if not overruled *sub silentio*. In addition, the incentive for employers to enter into collective bargaining agreements with grievance and arbitration clauses will necessarily diminish as more union employees abandon grievance and arbitration remedies to resolve employment disputes.

II.

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS' CLAIMS ARE NOT PREEMPTED UNDER THE PRINCIPLES OF *GARMON* CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS AND THIS COURT.

The Solicitor General agrees with petitioners' contentions that the alleged conduct in respondents' complaint is arguably prohibited under the Act and that the Ninth Circuit's decision to the contrary was unfaithful to this Court's decision in *Garmon*. (Solicitor General's Br. at 12-14.) In addition, the Solicitor General notes that the state law claims likely share a crucial element with an unfair labor practice charge that could be brought before the Board, thus satisfying this Court's decision in *Operating Engineers v. Jones*, and he criticizes the Ninth Circuit for wholly ignoring that decision and requiring instead that the controversies be "identical." (Solicitor General's Br. at 15-16.) Nonetheless, the Solicitor General concludes that there is no inter-circuit conflict sufficient to justify the grant of the petition for writ of certiorari. The Solicitor General not only fails to perceive correctly the nature of the inter-circuit conflict, but ignores the equally important reason for granting certiorari, based on his own analysis, that the Ninth Circuit's decision conflicts with this Court's decisions in *Garmon, Operating Engineers v. Jones*, and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) as well as Board authority. (Solicitor General's Br. at 13 n.13.) There is, therefore, independent justification to grant the petition for writ of certiorari, even absent a clear inter-circuit conflict, to ensure that the Board's jurisdiction over labor disputes will not be eroded.

In an effort to downplay the conflict among the circuit courts, the Solicitor General, like the Ninth Circuit, attempts to distinguish this case from cases in the Sixth, Seventh and Eleventh Circuits in which the courts have found similar alleged misrepresentations about plant closure to be preempted under *Garmon*. *See Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Kolentus v. Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987). In each of these cases, as in this one, the allegation that the employer concealed its decision to close and affirmatively misled the union and its employees was the cornerstone of the complaint. In the *Serrano* line of cases, the alleged misrepresentations for the most part were made to the union during concession bargaining, and the Solicitor General concludes, without analysis, that the Ninth Circuit's decision is therefore distinguishable because the alleged misrepresentations in this case purportedly were made outside the context of formal bargaining and directly to employees.

These factual dissimilarities are distinctions without a difference. The Solicitor General does not dispute petitioners' position that unfair labor practice charges based on bad faith bargaining or refusal to bargain are *not* dependent on the existence of formal ongoing negotiations. As set forth in the Petition (at 21), the law imposes a *continuing* duty to bargain in good faith. Effects bargaining obligations, in particular, may frequently arise independently of formal negotiation schedules. The *Serrano* court correctly held, for example, that fraudulently misleading union employees about an impending plant closure after the conclusion of concession bargaining would violate the Act both because the employer has an independent obligation to bargain in good faith over the effects of closure and because the duty to bargain over concessions is an ongoing process. 790 F.2d at 1283, 1287.

Nor does the Solicitor General explain why purportedly lying to union employees about plant closure rather than to the union is a material distinction from the *Serrano* line of cases; indeed, since the duty to bargain extends to the union, bypassing the representative entirely to mislead employees about plant closure presents a far clearer case of an unfair labor practice because it embodies direct dealing and unilateral change as well as bad faith bargaining. *See Talbot v. Robert Mathews Distributing Co.*, 961 F.2d at 659-60 (allegations that employer allegedly failed to disclose pertinent facts to union employees and made misrepresentations regarding plaintiffs' transfer and termination of employment constitute conduct arguably prohibited by the Act as bad faith bargaining, despite absence of any bargaining with the union).

Similarly, the Solicitor General skates by the inter-circuit conflict presented by the Ninth Circuit's conclusions that the unfair labor practice and state law claims would not be "identical" and that the unfair labor practice would be of only peripheral concern to the Act. As discussed in the Petition (at 21-22), the unfair labor practice and state law claims are "identical": each depends on the finding that Milne made the alleged representations of job security knowing it had already decided to close the facility and that Milne withheld information about its decision to close after the decision was made. In contrast to the Ninth Circuit, the courts in the *Serrano* line of cases examined *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978) and *Operating Engineers v. Jones* to find similar fraud allegations preempted. First, whether they applied *Sears* or this Court's later decision in *Jones*, the courts in *Serrano*, *Parker* and *Kolentus* found that allegations of misrepresentations about plant closure were sufficiently "identical" to the unfair labor practice charge which would be put before the Board. *Parker*, 855 F.2d at 1518; *Serrano*, 790 F.2d at

1285-86; *Kolentus*, 798 F.2d at 961. Second, in each of these cases the court determined that *Belknap* was inapposite because in *Belknap* the state law claims and unfair labor practice charges lacked identity, and because failure of an employer to bargain in good faith about the terms and conditions of employment is not "peripheral" but "strikes at the heart of one of the basic concerns of that law." *Serrano*, 790 F.2d at 1287. *See also Parker,* 855 F.2d at 1518, *Kolentus*, 798 F.2d at 961.

Respondents allege conduct which, if true, poses an unquestionable violation of the Act. The Ninth Circuit's decision materially conflicts with decisions from other circuits and, as the Solicitor General acknowledges, with this Court's decisions and Board authority. The Ninth Circuit's decision serves to defeat the primacy of the Board's jurisdiction over labor disputes. The decision should not be permitted to remain as controlling law within the Ninth Circuit or as guiding precedent for the rest of the circuits. As the Eleventh Circuit stated in *Parker*: "[e]roding the Board's jurisdiction over claims involving a failure to bargain in good faith will inevitably eviscerate the Labor Act and all that it has accomplished." 855 F.2d at 1518. In light of the Ninth Circuit's clear departure from this Court's decisions, acknowledged by the Solicitor General, it is appropriate for this Court to summarily reverse the decision below as to the second "Question Presented."

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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